No. 337, 88
Ex. of Paine for Choctaws
FILED
FEB 27 1900
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Feb. 27, 1900.

No. 337.

THE UNITED STATES, APPELLANTS,

v.

THE CHOCTAW NATION AND THE CHICKASAW NATION, AND THE WICHITA AND AFFILIATED BANDS OF INDIANS.

APPEAL FROM COURT OF CLAIMS.

Brief for Choctaws and Chickasaws.

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WASHINGTON, D. C.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1900.

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THE CHOCTAW NATION AND THE CHICKASAW NATION AND THE WICHITA AND AFFILIATED BANDS OF INDIANS.

BRIEF FOR CHOCTAWS AND CHICKASAWS.

I.

The word "cede" does not per se import a transfer of the absolute beneficial ownership of the ceded territory.

It is contended that the ceding clause in this treaty of 1866 is absolutely clear and unambiguous, so that no room is open for interpretation. The words of the clause are these :

> The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the ninety-eighth degree west longitude known as the leased district: PROVIDED, &c. Appendix to Rec. 30.

The contention that this clause is clear and unambiguous, beyond the reach of interpretation, is based upon the

assumption that when the ceding clause contains no words to qualify, or limit, the meaning of the word "cede" (or "cession") that word *per se* necessarily imports a conveyance of the absolute beneficial ownership of the land. This is, I submit, an unwarranted assumption. The words *cede* and *cession*, which, in modified forms, appear in several European languages of Latin derivation, never *per se* import a conveyance of the beneficial ownership of the land. That such is their import can *never* be determined, without recourse to other clauses of the treaty, or to outside facts.

The cession may be only a transfer of paramount dominion. It may be a mere transfer of subordinate dominion, paramount dominion being reserved by the ceding party. It may be a conveyance of the legal title in trust for certain purposes, or by way of mortgage. It may be a transfer of the beneficial ownership of public property. It may be the transfer of the beneficial ownership of private property. The import of the word *cede*, standing unqualified in the ceding clause of a particular treaty, is to be ascertained by looking to other clauses of the treaty, or to the relations and circumstances of the contracting parties, and to other facts outside the treaty.

By the treaty of St. Ildefonso Spain, in 1800, retroceded the province of Louisiana to France. The word "cede" was used both in the Spanish version and in the French version of that treaty. Did it import a transfer of dominion without property, or a transfer of dominion and of public property, or a transfer of dominion and of both public and private property? Did it import an unconditional transfer of either dominion or property? If the counsel correctly interprets the word "cede," the cession was an absolute unconditional conveyance of every square foot of land within the exterior limits of the province of

Louisiana; for every foot of that land was ceded by the treaty. But that province had been held by France and Spain, successively, for one hundred and fifteen years. During that period private property had been acquired, by extensive royal grants, in New Orleans and in other parts of Louisiana. Did the word "cede," *per se*, take that property from its private owners and convey it to France? Does it even import that Spain, in the exercise of the right of eminent domain, had taken that property, and, by the treaty, transferred it to France?

I submit that in order to determine whether the treaty conveyed private property in the lands of Louisiana, as well as dominion over the same, we must look to other parts of the treaty or to extraneous facts.

Again, did the word "cede" import, *per se*, an absolute transfer of *anything*,—either of dominion or of property? For an answer we must look to other parts of the treaty. And other clauses show us that the cession was wholly conditional,—was not to take effect at all, unless, or until, France should consummate certain projects undertaken in the interest of the Duke of Parma.

The word "cede" is used in the English version and the word "cession" in the French version of the treaty of 1803, by which the United States acquired the province of Louisiana. 8 Stat. 200; Appendix to Rec. 7. Was that cession a mere transfer of dominion, or was it also a conveyance of property? If it was a transfer of property, was it a conveyance merely of public property, or also of private property? It might have been a transfer of dominion only. If Louisiana, or any part of that province, was the public property of the nation, the cession might, of course, have been a transfer of public property, as well as of dominion. But it might also have embraced a conveyance of private property

in the city of New Orleans, or elsewhere. For France was a sovereign state, invested with the power of eminent domain. The precise meaning of the word "cede," in that treaty, can be determined,—and can only be determined,—by recourse to other clauses of the treaty and to outside facts.

Was the cession of 1820, by the United States to the Choctaws (7 Stat. 210; Appendix to Rec. 9), a transfer of paramount dominion,—or was it a transfer of dominion subordinate to the paramount dominion of the United States? Was it a conveyance of public property? Was it a conveyance of private property, effected through the exercise of the power of eminent domain? The ceding clause of the treaty does not answer these questions. For answers we must look to other parts of the treaty, or to the circumstances and relations of the parties and other facts. To determine whether the dominion transferred was paramount, or merely subordinate, paramount dominion over the ceded territory being reserved by the United States, it is necessary to ascertain whether the relations of the parties admitted of the exercise of paramount dominion by the Choctaw nation. To determine whether the cession was a transfer of public, or of private, property it is necessary to ascertain whether the land was public, or private, property, and, if any part of it was private property, whether it was the intention of the United States, in the exercise of the right of eminent domain, to take that property and convey it to the Indians.

Was the cession of the leased district by the Choctaws to the United States, in 1866 (14 Stat. 785; Appendix to Rec. 30), a transfer of paramount dominion,—a transfer of subordinate dominion,—a conveyance of public property,—a conveyance of private prop-

erty,—a conveyance of the absolute beneficial ownership of public or private property,—or a mere conveyance of the legal title, in trust for the settlement of friendly Indians on the land? The ceding clause gives no answer to these questions. For answers we must look to the context of the treaty and to facts outside the treaty. Looking to facts outside the treaty, we learn that the Choctaw nation was never invested with paramount dominion over the leased district, and, therefore, was incapable of transferring it,—could only dispose of the subordinate dominion with which it was, in fact, invested.

Did the cession embrace private property of the Choctaw and Chickasaw citizens, or only public property of the Choctaw and Chickasaw nations, in the ceded lands? To decide that question we must first ascertain whether the land was, or was not, wholly, or in part, private property. On that question there is a difference of opinion. The treaty of June 22, 1855, contains the following provision:

> And, pursuant to an act of Congress approved May 28, 1830, the United States do hereby forever secure and guaranty the lands embraced within the said limits to the *members* of the Choctaw and Chickasaw tribes, *their heirs and successors, to be held in common, so that each and every member of either tribe shall have an equal undivided interest in the whole.*

If the effect of this provision was to make all, or any part, of the land private property, the question, whether the cession was a conveyance of such private property, is to be determined otherwise than by recourse to the word "cede."

It will be necessary to look to the context of the treaty of 1866 and to pertinent facts outside the treaty, in order to ascertain whether this cession was a conveyance of the absolute beneficial ownership of the land, or only a conveyance of the legal title, in trust for the settlement of friendly Indians on the land. But, before entering

upon that investigation, let us recall the general rules governing the interpretation of treaties, and also the special rules applicable to the interpretation of treaties with the Indians.

II.

General Rules of Interpretation.

A deed absolute upon its face may be shown, by evidence *aliunde*, to be a deed in trust. Babcock *v.* Wyman, 19 How. 289; Russell *v.* Southard, 12 How. 154; Conway *v.* Alexander, 7 Cranch, 238; Morris *v.* Nixon, 1 How. 126; Osterman *v.* Baldwin, 6 Wall. 116; Morris *v.* Nixon, 17 Pet. 109; Flagg *v.* Walker, 113 U. S. 659.

When the *apparent* meaning of terms used in a contract involves injustice and absurdity, that fact suffices to occasion a doubt as to their *real* meaning, and it becomes competent for the court to ascertain that meaning by recourse to outside facts.

The same rules of interpretation are to be applied to treaties as to other contracts. United States *v.* Percheman, 7 Pet. 51; *In re* Ross, 140 U. S. 458; 1 Kent. Comm. 174; Maryatt *v.* Wilson, 1 Bos. and Pull. 438, 439; Wheaton Int. Law, pt. 3, c. 2, § 17; Gardner, Inst. c. 12, § 13; Kent. Int. Law, 391; Vattel, bk. 2, c. 17, §§ 282, 289

Treaties are to be so construed as to give effect to the objects of the parties; and, for that purpose, *all of their provisions are to be examined in the light of attendant and surrounding circumstances.* *In re* Ross, 140 U. S. 453; Vattel, bk. 2, c. 17, §§ 270, 277, 279, 280.

An interpretation which leads to an absurdity is to be rejected; and this rule is to be applied even when the text of the treaty does not, considered by itself, present

either obscurity, or ambiguity, in its language. Vattel, bk. 2, c. 17, §282; Grotius, bk. 2, c. 16, §5. Appendix to Rec. 61, 63.

III.

Special rule of interpretation applicable to Indian treaties.

Treaties with Indian nations are to be liberally construed in favor of the Indians. Worcester *v.* Georgia, 6 Pet. 515, 583; United States *v.* Kagama, 118 U. S. 375, 383; Choctaw Nation *v.* United States, 119 U. S. 1, 27.

The relation existing between the United States and these nations, which has been likened to the relation between guardian and ward, necessitates this rule of interpretation.

The counsel for the appellant contends that this rule of interpretation is not applicable to the treaty of 1866, because, as they assert, the Choctaws and Chickasaws were not "unlettered people," in 1866; but were "capable of dealing at arm's length" with the United States. They assume that the fact, which fixed the relation defined by the court, was the "illiteracy" of the Choctaws and Chickasaws. This is evidently a mistake. The main facts, which fix this relation, are, on the one side, the *weakness, helplessness* and *dependence* of the Indians, and, on the other, the *paramount power* and *sovereignty* of the United States. So this court has decided in 119 U. S. 27, quoted on page 25 of this brief, and also on pages 53 to 56 of the "Appendix to the Record." The Choctaws and Chickasaws were, in 1866, as in 1820, weak dependent tribes. They were absolutely in the power of the government of the United States. With this power was coupled a correlative obligation of the government not only to protect them from wrongs at the hands of others, but also

to abstain itself from taking advantage of them, by means of harsh and overreaching bargains.

The reason, for the application of the rule of interpretation of Indian treaties adopted by this court, was very much stronger, in the case of the treaty of 1866, than in the case of the treaty of 1820; for, as will be hereafter shown, at the commencement of the negotiation of the treaty of 1866, the Choctaws and Chickasaws *were virtually placed under duress* by the commissioners of the United States.

IV.

Absurdity and injustice of the interpretation which makes the cession an absolute conveyance.

That interpretation of the treaty of 1866, which finds in the treaty a transfer, by the Choctaw and Chickasaw nations, to the United States, of the absolute beneficial ownership of the leased district, leads, I submit, to such palpable absurdities, to such gross injustice, that this court will not make haste to accept it as the true expression of the intent of the parties to the contract.

If it be true that, by the treaty of 1866, the United States acquired, from the Choctaws and Chickasaws, the absolute beneficial ownership of the "leased district," then it is true that, for the consideration of $800,000, the United States have acquired from the Choctaws and Chickasaws 15,938,519 acres of land, worth, in 1866, at the government price, ($1.25 or $2.50) $19,923,138 or $39,846,276, and worth to-day more than $50,000,000. The leased district amounts in area to 7,713,239 acres; the Choctaw land west of the leased district to 8,225,220 acres; the aggregate being 15,938,519 acres. How did the Choctaws become invested with the ownership of

these lands? Did they merely hold them by the right of Indian occupancy? Certainly not. Were these lands a gift—a gratuity—from the United States to the Choctaws? Not at all. They bought them from the United States. And they paid for them a price which was many times their value in 1820 and 1830. The Choctaws owned and occupied 15,000,000 acres of land, in the State of Mississippi. Their title is carried back, by authentic history, more than two hundred years. Their nation had existed, as a nation, on that ground, certainly for one hundred years, probably for several hundred years, before the commencement of our national existence. Soon after the organization of our government, that is to say, on the 3d of January, 1786, a treaty was concluded between the Choctaws and the United States, defining the boundaries of the Choctaw Nation.

As I said, the only consideration ever paid by the United States for these two bodies of land, amounting in round numbers to 16,000,000 acres, was $800,000. That sum was paid, in 1855, for the *cession* of the eight and one quarter millions acres west of the 100th meridian, AND the *lease* of the district between the 98th and 100th meridians. Am I mistaken on this point? Was any part of the $300,000 mentioned in article 3 of the treaty of 1866 paid for these lands? As shown in the opinion of the Court of Claims and on pages 17, 18, of this brief, and also on pages 32, 33 of my brief in cause No. 338, not one penny of that sum was paid for these lands. But if the whole sum of $300,000 had been paid for the land, the total price paid for lands worth, in 1866, more than $19,000,000, would have amounted to only $1,100,000. Was such a bargain ever before made between a powerful republic and a dependent Indian tribe? Did a court of equity ever approve such a bargain between guardian and ward?

But the interpretation, which makes this cession of 1866 a conveyance of the absolute beneficial ownership of the leased district, and not a mere conveyance of the legal title, in trust for the settlement of friendly Indians on the land, involves a still more palpable absurdity. In 1855 the gross sum of $800,000 was paid for the relinquishment of the eight and one-quarter millions of acres west of the 100th meridian, AND the lease of the seven and three-quarters millions of acres between the 98th and 100th meridians. Whatever part of that gross payment was applicable to the lease, whether the whole or one-half, or none at all, the lease was acquired by the United States subject to five conditions, viz:

(1) The land was to be used only for the settlement of friendly Indians.

(2) The Choctaws and Chickasaws reserved the right to settle on the land.

(3) The Choctaw nation reserved jurisdiction of Choctaws and Chickasaws residing on the land.

(4) The leased land remained a part of the Choctaw district.

(5) The United States were to make no regulations, for the government of any Indians in the district, inconsistent with the interests of the Choctaws and Chickasaws.

Whatever was paid for the lease, in 1855, was paid for the lease subject to all these conditions.

If the cession of 1866 was an absolute conveyance, all these conditions were swept away, and the United States became the beneficial owner of the entire leased district, without paying any consideration whatever for the *substitution* of the *beneficial ownership* of the land, in lieu of the *conditional leasehold interest* acquired by the treaty of 1855. If the cession was an absolute conveyance, the United States, without the payment of a single dollar,

obtained from the Indians an absolute unqualified title to the land, in lieu of a mere lease subject to the five conditions which I have indicated. The obligation of the United States to locate Indians on the land was extinguished. It was to be used for general settlement, or for any other purpose, at the discretion of the government. The Choctaws and Chickasaws were excluded from the land. The Choctaw nation was deprived of jurisdiction of settlers already there. The leased land ceased to be a part of the Choctaw district. The obligation of the United States to make no regulations, for the government of Indians in the district, inconsistent with the rights and interests of the Choctaws and Chickasaws, was extinguished.

I think that a court of equity will be slow to accept an interpretation of the treaty of 1866 which involves an absurdity so monstrous.

On pages 128 to 134 of his brief the counsel contends that although the Choctaws and Chickasaws demanded $400,000 for the quit-claim and $400,000 for the lease,—in all $800,000,—and the United States promised to pay $800,000 for the quit-claim and lease, little, or nothing, was, in fact, paid for the quit-claim; but all, or most, of the $800,000 was paid for the lease. I submit that the correspondence of the parties, which immediately preceded the signing of the treaty, printed in the Court of Claims Record in Choctaw Nation *v.* U. S., 119 U. S. 1, conclusively establishes three facts, viz: (1) that the Choctaws and Chickasaws understood that one-half of the $800,000 was payable for the quit-claim; (2) that the Secretary of the Interior knew that such was the understanding of the Choctaws and Chickasaws; and (3) that he permitted them to so understand the treaty. In the letter of July 11, 1854, from the Choctaw Delegates to the Acting Commissioner of Indian Affairs, they said:

Our country extends west to the headwaters of the Canadian, about the 103d degree of west longitude, and we are prepared to maintain our rights to a boundary that far west, by facts and evidence which cannot be disputed. In the compromise with Texas, in 1850, that portion of our country west of the 100th degree of west longitude was assigned to that state, in direct and palpable violation of our rights. We must demand to be repossessed of this portion of our country; and, if this is not done, our people will take possession of it, and leave the government to settle with Texas and the Indians upon it for such damages as they claim.

General John H. Eaton, one of the negotiators of the Choctaw treaty of 1830, in his letter of December 19, 1854, to the Choctaw delegates said:

At the concluding interview in council, when, for the second and last time, we had met for them to conclude or refuse the treaty, perceiving the decided opposition of the Indians, I addressed them (many knew our language) and said: "The United States neither need nor want your lands for any purpose of profit, for already they have lands enough and to spare; the only object is to have jurisdiction over your country, and save you from the encroachments of the whites which cannot be prevented." I said, moreover, that "if a treaty were not made, the president would withdraw the agent, and leave them under the state laws." These declarations had great influence, and thereupon they hastily came forward and signed the treaty. Thus a great gain was effected. The Choctaws were disposed of.

In a letter from D. H. Cooper, Indian agent, dated Washington April 9, 1855, and addressed to the Choctaw delegates, he said:

Gentlemen: I am, to-day, in receipt of a letter from the Hon. Geo. W. Manypenny, commissioner of Indian affairs, instructing me to confer with the Choctaw delegation now in this city, for the purpose of ascertaining what arrangements, if any, can be made with them having in in view the adjustment of all differences between their tribe and the Chickasaw tribe of Indians, the government of the United States, and the permanent settlement of the Witchita and other bands of Indians in the Choctaw country.

I respectfully request that you will furnish me, as early as practicable, with an answer in writing to the above interrogatories, in order that the same may be reported to the commissioner of Indian affairs.

The reply of the Choctaw delegates, to the foregoing letter, is dated April 10, 1855, and contains the following statement:

We and our people have, however, as we have ever had, every disposition to comply with the policy and wishes of the government; and if it be an object of importance to it to have these Indians accommodated with a home, within the boundaries of our country, though such an

arrangement would be greatly repugnant to our inclinations and feelings, we would consent to it, on fair and reasonable terms, if it can be made a part of a just and equitable adjustment of all the matters involved in the existing controversy between the Choctaws and the government, otherwise we could not take the serious responsibility of encountering the prejudices and opposition of our people.

On April 21, 1855, the secretary of the interior wrote to the commissioner of Indian affairs as follows:

If you have any plan for the settlement of these difficulties, or if the Choctaws will submit a distinct offer as the terms on which they will settle with the Chickasaws, and provide for the Witchitas and other Indians within the limits of the Choctaw country, the department will give it prompt consideration, and with every disposition to award to them and the Chickasaws such degree of favor as may not be incompatible with the rights and interests of the United States.

On the 23d of April, 1855, the commissioner wrote to the Indian agent as follows:

You will also ascertain upon what terms the Choctaws will arrange with the United States for the use of their country west of 98° west longitude, for the Witchitas and such other bands of Indians as the Government may desire to settle permanently west of that degree of longitude. Also upon what terms the right to settle said Indians west of 99° west longitude can be obtained, and report to this office, with the least delay possible.

In their letter of April 24, 1855, to the Indian agent, the Choctaw delegates said:

2. We will agree to provide, in the same convention or supplemental treaty, that the government shall have the permanent use of a limited portion of the western part of our country, for the accommodation of the Witchita and other bands of Indians, for a fair and just consideration, the amount to depend, of course, upon the extent of country required for the purpose. The commissioner of Indian affairs requires you to ascertain our terms for the use of that portion of our country west of the 98th degree of west longitude, and also for that west of the 99th degree. We are unwilling to lease, for the purpose mentioned, any portion of our country east of the 99th degree; but for the lease of that west of that degree, we will consent, in behalf of our people, to take the sum of four hundred thousand dollars.

The secretary, in his letter of April 27, 1855, to the commissioner, said:

I think, however, that notwithstanding their claim to an extent of country west of the 100th meridian of longitude is regarded, by the department, as without any foundation in law or equity, *it might prevent further trouble* in regard to it to insert an article, in the supplemental treaty or convention now to be held, requiring the Choctaws to relinquish and abandon all right or claim to the same.

On the 2d of May, 1855, the Indian agent wrote to the Choctaw delegates as follows:

I desire to ascertain whether you will agree, the Chickasaws assenting, to lease the country included between 98° and 100° west longitude and between Red and Canadian Rivers to the United States, for the permanent settlement of the Witchita and other bands of Indians within the territoral limits of the Choctaw nation; and, if so, upon what terms,—it being understood that the Choctaws shall relinquish and quit-claim, in favor of the United States, whatever interest they may have in the country lying west of the 100° of west longitude.

On the 3d of May, 1855, the Choctaw delegates replied as follows:

The question of the total relinquishment of any portion of our territorial rights is one of even greater delicacy and difficulty. We have fully acquainted you with the grounds of our claim to title to the headwaters of the Canadian river, extending as far west, at least, as to the 103° of west longitude. We believe our title to be perfectly valid and good; but, as it is questioned, if not disputed, by the government west of the 100° of west longitude, and we are anxious to put at rest all questions of controversy with it, we will relinquish and quitclaim to it our rights west of that degree of longitude, on fair and equitable terms. The extent of country involved is large; we know it to be valuable; and we believe the acquisition of our title to it to be important to the government; still we have no disposition to be exorbitant. As a consideration for the whole arrangement, *we would consent to take eight hundred thousand dollars—one half thereof for the lease of the country between the* 98° *and* 100° *west longitude, and the other half for the relinquishment of our right west of the latter degree.*

The above proposition has reference to the arrangement as a whole. Were it to be confined only to the lease of the portion of the country between the two degrees of longitude mentioned, we should for obvious reasons feel constrained to ask not less than six hundred thousand dollars therefor.

On the 4th of May, 1855, the Indian agent wrote to the Choctaw delegation as follows:

If the Choctaws will propose to lease to the United States the territory west of 98° and east of 100° west longitude, (the Chickasaws assenting) and couple with it a relinquishment of all claim west of 100° west longitude, the government will agree to pay them $600,000.

The letter of June 7, 1855, from the commissioner to the acting secretary, contains the following statement:

* * After consultation with the secretary of the interior, and with his concurrence, Agent Cooper was instructed, verbally, to inform the delegation that if they would accept the sum of $600,000 for the lease of the country between the two degrees, and the relinquishment west of the 100°, the government would give that sum. The delegation assented to

this proposition, and agreed to take the sum of $600,000 for the lease of the territory within the two degrees mentioned, and the relinquishment of their claims to the country west of the 100th degree. The Chickasaw delegation also assented and agreed to the terms of the lease, and the question was settled, as I supposed: but both delegations now contend that the United States shall be restricted, in the number of bands of Indians to be located in the country leased, to such as are now residing in it. With such a limitation on the use of the country, the lease would be of but little value, and I have, therefore, declined to assent to the limitation which the Indians desire to impose, and have claimed that the government must be left free to locate such Indians as it may desire within the ceded country. * *

The delegations propose, as a compromise, that the Choctaws quitclaim to the country west of 100°, and that they and the Chickasaws will lease the country between 99° and 100° for the permanent settlement of any Indians whom the government may desire to locate therein, for the sum of $600,000.

In their letter of June 11, 1855, to the commissioner, the Choctaw delegates said:

We will agree to take the eight hundred thousand dollars now offered for the lease and relinquishment, and to the location, within the country leased, of the Indians included in your original proposition, which we have quoted—Choctaws and Chickasaws to have the right to settle in the leased country as now—if you will consent to the modified proposition in regard to our claim herein submitted.

In the letter of June 14, 1855, from the Choctaw delegates to the commissioner of Indian affairs, they say:

The lease we had consented to agree to was a limited one, viz: for the permanent settlement, within the country leased, of the Witchita and several alien tribes and bands now in our country, the government to have the control of them, but we still to retain jurisdiction over the country itself, with the right of settlement therein by Choctaws and Chickasaws as heretofore, as expressed and provided for in the convention. If the government had the unrestricted right to bring in any and all Indians it pleased, the whole district might soon be filled up with a discordant, restless and predatory population, which would endanger the frontier settlements of the Choctaws and Chickasaws, deprive us practically of our jurisdiction and necessarily exclude Choctaws and Chickasaws from settling within the district, if they so desired. Such an arrangement would be a virtual sale of that portion of our country, to which we could under no circumstances submit. Moreover the consideration offered would be entirely inadequate. We had agreed to relinquish our claims to territory west of the 100° of west longitude, embracing at least six and a half millions of acres. The district desired to be leased contains quite seven millions more: so that practically the government would have acquired from us some thirteen and a half millions of acres of land, for the certainly insufficient sum of six hundred thousand dollars.

Let it be assumed, then, for a moment, that the Secre-

tary did not acknowledge that the Choctaws had any right or interest connected with land west of the 100th meridian. Nevertheless the three facts disclosed by this correspondence are decisive of the position that $400,000 was payable for the quit-claim. For a promise, made in a treaty, is always to be interpreted in the sense in which the promiser knowingly permitted the promisee to understand it.

Again, the evidence establishes the following facts: (1) The land in question west of the 100th meridian was ceded, by the United States to the Choctaws, in 1820. (2) Without the consent or knowledge of the Choctaws, the United States, exercising the right of eminent domain, subsequently took this land and ceded it to Spain. (3) It was worth many times the sum of $800,000. (4) Nothing whatever has been paid to the Choctaws for their interest in this land, unless the sum of $400,000 was paid for it, under the treaty of 1855. If, therefore, the three facts established by the correspondence above quoted, standing alone, did not prove that at least $400,000 was paid for the quit-claim, when supplemented by the last mentioned facts they could leave no doubt on the subject.

But there is no evidence to prove that the Secretary himself did not intend that half of the $800,000 should be applicable to the quit-claim. The evidence does show that he doubted the validity of the Choctaws' title to land west of the 100th meridian, but it does not show that, after learning the grounds on which the Choctaw delegates based their claim, he did not consent to their demand in order, to use his own words, to "prevent further trouble in regard to it."

V.

he interpretation which makes the ceding clause an abso-lute conveyance, is inconsistent with other parts of the treaty.

Coupled with this ceding clause is an explanatory and ualifying *proviso*, which conclusively shows that the so-lled consideration of $300,000 was not a consideration r the cession of the land, and could never become the roperty of the Choctaws and Chickasaws, unless their gislatures should enact certain laws, the enactment of hich was, by the terms of the treaty, left to the option those legislatures. Referring to article 3 of the treaty, page 30 of the "Appendix to the Record," the court ill observe that the following is the effect of the proviso, hich is coupled to the ceding clause :

This money was to remain in the treasury two years nless, before the expiration of that period, the Choc-aws and Chickasaws should elect to confer, and should onfer, upon their freedmen "*all the rights, privileges, nd immunities (including the right of suffrage) of citi-ens of said nations*," except in their annuities, moneys, nd public domain, and should also give to their freed-nen,—men, women, and children,—each forty acres of and. If their freedmen, who were estimated to number ,000, should emigrate, this sum of $300,000 was all to e paid to them,—$100 to each emigrant. If none of the reedmen should emigrate, and if the Choctaws and hickasaws should fail to confer upon each freedman itizenship and forty acres of land, the whole of the 300,000 was to remain the property of the United States. f a part only of the freedmen should emigrate, and the hoctaws and Chickasaws should grant citizenship and

forty acres of land to those refusing to emigrate, the Choctaws and Chickasaws were to receive the balance of the $300,000, after deducting the amount paid to the emigrants. Only in the event that the Choctaws and Chickasaws should grant citizenship and forty acres of land to each of the freedmen, and all the freedmen should refuse to emigrate, was the sum of $300,000 to become wholly the property of the Choctaws and Chickasaws.

But this sum was not, nor was any part of it, to be paid to the Choctaws and Chickasaws, as the *consideration* for the cession of the leased district. It was to be paid to them as a consideration for the grant of forty acres of land and of citizenship, including the right of suffrage to each of their freedmen.

In accordance with the stipulations of article 46, the United States loaned to the Choctaws and Chickasaws the sum of $200,000. This loan was to be repaid out of the $300,000 mentioned in the first article, if that money should become the property of the Choctaws and Chickasaws. If it should not become their property, the loan was to be repaid out of any funds of those nations in the treasury of the United States.

Our opponents contend that article 30 substituted for the trust to settle friendly Indians in the district west of the ninety-eighth meridian, which was created by the lease of 1855, a stipulation, by the Choctaws and Chickasaws, to permit certain Indians to settle among themselves, in their country east of the ninety-eighth meridian, and that this stipulation furnishes a reason for claiming that the cession in the third article is a cession of the absolute ownership of the land west of that meridian. It would be difficult to overestimate the absurdity and injustice involved in such a bargain. It would have amounted to this. The United States, without the payment of a dollar,

would not only have succeeded in becoming the absolute beneficial owners of over 7,000,000 acres of land freed from the trust attached to the lease, but would also have obtained from the Choctaws and Chickasaws a new and gratuitous concession of land within the country in which the Choctaws and Chickasaws themselves resided. The Choctaws and Chickasaws would have gratuitously substituted an *absolute title* to their land west of the ninety-eighth meridian for a conditional lease, and, for the privilege of doing so, would have given away a large part of their land east of that meridian. This would have been harder than the average of Indian bargains. The Indians have been in the habit of parting with their lands for trifling considerations; but they have not been in the habit of paying exorbitant prices for the privilege of doing so. The fact is that article 30, which is alleged to have effected this absurd result, never took effect at all, because the Choctaw and Chickasaw legislatures did not enact the legislation, upon the enactment of which it was to become operative.

In this third article the United States agree, "within ninety days from the expiration of said two years, to remove from said nations all such persons of African descent as may be willing to remove." It must have been the intention of the parties to the treaty that these freedmen should be settled in the leased district, for there was no other land available for that purpose.

Unless the cession of article 3 was a cession in trust for the settlement of Indians on the land between the ninety-eighth and one hundredth meridians, there was, in the treaty of 1866, no compliance with the fifth peremptory requirement of the Fort Smith Commissioners, that land should be set apart, by the treaty, for Indian settlement.

If the cession of 1866 was not a cession in trust for the settlement of friendly Indians in the leased district, that treaty actually abrogated the trust created by the lease of 1855 and authorized the United States to exclude Indians from the district altogether, and to appropriate to their own use the proceeds of over 7,000,000 acres of land.

One of two things must be true. It must be true that the cession of article 3 was a cession, in trust, for the settlement of friendly Indians on the land; or it must be true that, so far as the Choctaws and Chickasaws were concerned, the authorities of the United States used the fifth proposition merely as a pretext, to cover the acquisition of an absolute title to the leased district, exempt from a trust for the settlement of Indians, and open to general settlement. There is no ground for this grave charge against the commissioners who negotiated the treaty, or the senate who advised its ratification, or the president who ratified it.

The assumption that the Choctaws and Chickasaws would have conveyed, or the United States consented to acquire, virtually without consideration, 7,713,239 acres of land worth, in 1866, at the government price, from $9,641,548 to $19,283,096, and worth, in 1892, over $40,000,000, would, of course, be unreasonable. The real consideration, not being *expressed*, must be *implied*, in the treaty. And that consideration must have been the trust to settle friendly Indians on the land, upon the breach of which the Choctaws and Chickasaws would become entitled to compensation for so much of it as should be diverted from the purposes of the trust.

VI.

Proceedings of the Fort Smith Council.

Leaving out of view the gross absurdity involved in that interpretation which makes the cession a conveyance of the unqualified beneficial ownership of the land, we shall find in the proceedings of the Fort Smith council of 1865, conclusive proof that the parties intended the cession as a conveyance in trust for the settlement of friendly Indians on the land. There are extant four different reports of the proceedings of that council, viz: (1) The report of Mr. Cooley, the commissioner of Indian affairs, who was the president of the council, commencing on page 34 of the "Report of the Commissioner of Indian Affairs" for 1865; (2) The report of Mr. Cooley, president of the council, commencing on page 296 of the same document; (3) The report of Mr. C. E. Mix, the secretary of the council, commencing on page 312 of the same document; and (4) the original papers on file in the Indian Office.

In the first, Commissioner Cooley says, on page 34:

> On the next day (September 9) the delegates were informed that the commissioners were empowered to enter into treaties with the several tribes, upon the basis of the following propositions: * * *
>
> 5th. A part of the Indian country to be set apart to be purchased for the use of such Indians from Kansas, or elsewhere, as the government may desire to colonize therein.

On page 36 Mr. Cooley says:

> With the Choctaws and Chickasaws a treaty was agreed upon, upon the basis of the seven propositions heretofore stated, and in addition to which those tribes agreed to a thorough and friendly union among their own people, and forgetfulness of past differences; to the opening of the leased lands to the settlement of any tribes, whom the government of the United States may desire to place thereon; and to the cession of one-third of their remaining area for the same purpose; the United States to restore those tribes to their rights forfeited by the rebellion. This treaty, after its approval by the councils of the Choctaws and Chickasaws, is to be signed, in this city, by three delegates from each nation sent here for that purpose.

It is not intended to hold any general council in this city; but it was understood that delegates would, if necessary, visit Washington, on behalf of any of the tribes owning lands in the Indian country, which the government might desire to *purchase* for the use of other Indians, so that, by properly accredited delegates, all necessary arrangements with the several tribes might be made.

In the second report Mr. Cooley, on page 298, says:

On the second day (Saturday, September 9), after council met, I addressed the Indians, in which I stated that the commissioners had considered the talks of the Indians on the preceding day, and had authorized me to submit the following statement and propositions, as the basis on which the United States were prepared to negotiate with them: * * *

Such treaties *must* contain substantially the following stipulations:

* * * * * * * * *

5. A portion of the lands owned and occupied by you must be set apart for the friendly tribes in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the government.

In the third report, on page 319, Secretary Mix says:

5. A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes now in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the government, or such as may be fixed by the government.

The fourth report appears in the original papers on file in the Indian office. On the 24th of January, 1898, the secretary of the interior transmitted to the court of claims the following original papers: (1) The printed address of the United States commissioners who attended the Fort Smith council of 1865, with an indorsement in pencil thereon. (2) The reply of the committee on the part of the Choctaws and Chickasaws to the said address, dated Fort Smith, Arkansas, September, 1865.

These papers are printed on pages 140, 141, 142, and 143 of the record. They are also printed on pages 74, 75, and 76 of the record.

In this original document the fifth requirement takes the following form:

5th. A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes now in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the government, or such as may be fixed by the government.

The indorsement, which is printed at the top of page 76 and also at the top of page 141, contains these words:

> The government will insist upon purchasing a portion of their lands for the settlement of friendly Indians.

Our opponents contend that this indorsement was not an element of the ultimatum presented to the Indians, by the commissioners of the United States, at the Fort Smith council,—that the demands of the United States were, in no way, qualified, colored, or affected by this indorsement,—that it was an unofficial inscription, which played no part in the proceedings of the council. They are mistaken. The court will observe, on pages 75 and 142 of the record, the following requirement of the commissioner:

> Brothers: You have now heard and understand what are the views and wishes of the president; and the commissioners, as they told you yesterday, *will expect definite answers* from each of you upon the questions submitted.

The court will also observe that the indorsement contains the following paragraph:

> A stipulation of general amnesty among themselves must be incorporated, and *no individual shall be proscribed, or any act of forfeiture, or confiscation, passed against those who remained friendly to the U. S.; but they shall enjoy equal privileges with other members of the nation.*

That the indorsement, which contains this paragraph, was a part of the official demand of the commissioners, is shown by the following facts:

1. The reply of the Choctaws printed on page 76 and also on pages 142–3 of the record, concludes as follows:

> We are also willing to incorporate a provision that *no individual shall be proscribed, or any act of forfeiture or confiscation passed, against those who remained friendly to the U. S., and that they shall enjoy equal privileges with other members of the nation.*

2. The fifth article of the treaty of 1866 contains the following words:

> And the Choctaws and Chickasaws, anxious for the restoration of kind and friendly feelings among themselves, do hereby declare an amnesty for all past offenses against their respective governments; and no Indian

or Indians shall be proscribed, or any act of forfeiture, or confiscation, passed against those who may have remained friendly to the United States; but they shall enjoy equal privileges with other members of said tribes; and all laws heretofore passed inconsistent herewith are hereby declared inoperative.

3. The draft of a preliminary treaty, submitted to the Indians by the commissioners at Fort Smith, contains the following provision:

ART. 8. The Choctaw and Chickasaw tribes of Indians, anxious for the restoration and preservation of kind and friendly feelings among themselves, do hereby declare a general amnesty of all past offenses, either against their government, or the government of the United States; and no Indian or Indians shall be proscribed, or any act of forfeiture, or confiscation, passed against those who may have remained friendly and loyal to the United States; but they shall all enjoy equal privileges with other members of said tribes.

4. This indorsement, as already stated, includes, on pages 76 and 141, the following clause:

The Gov'm't will insist on purchasing a portion of their lands for the settlement of friendly Indians.

This explains and qualifies the fifth requirement of the commissioners; and it also explains the fact that Mr. Cooley, the commissioner of Indian affairs, who was president of the Fort Smith council, on page 34 of his annual report for 1865, sets forth this fifth requirement in the following form:

5th. A part of the Indian country to be set apart to be purchased for the use of such Indians from Kansas, or elsewhere, as the government may desire to colonize therein.

These facts, I submit, conclusively prove that the indorsement was, in substance, embraced in the ultimatum presented by the commissioners,—that it gave character and coloring to that ultimatum, and was part and parcel of the official action of the commissioners. They prove too, I submit, that it was the deliberate purpose of the Choctaws and Chickasaws to convey and of the United States to receive the legal title to the leased district in trust for the settlement of friendly Indians on the land.

VII.

The relations existing between the parties to the treaty.

Now what were the relations existing at the time between the parties to this transaction,—between the United States and the Choctaw and Chickasaw nations,—between the purchaser and the vendors of these lands? Were the parties to the transaction equals, in legal contemplation, dealing with each other at arm's length,—free from duress,—intimidated by no threats,—at liberty to act or to decline to act, according to the dictates of their own judgment? No, the Choctaws and Chickasaws did not stand up, as equals, in this transaction. They were not able to deal at arm's length with the United States. They were not free from duress. They were not exempt from intimidation by threats. They were at the mercy of the United States, and were so notified at the commencement of the negotiations. They were not at liberty to accept, or reject, the ultimatum presented by the United States.

It was a transaction between a sovereign and a dependent,—between a guardian and a ward. In the very treaty of June 22, 1852, the United States secured from the Wichitas a stipulation in these words: "The Chickasaw tribe of Indians *acknowledge themselves to be under the guardianship* of the United States." That relation of guardian and ward has been substantially declared in many treaties between the Choctaws and Chickasaws and the United States. it has been declared *ex cathedra* again and again in the adjudications of this honorable court. In Choctaw Nation *v.* United States, 119 U. S. 1, 28, this court said:

As was said by this court recently in the case of United States *v.* Kagama, 118 U. S., 375, 383: "These Indian tribes are the *wards* of the nation; they are communities *dependent on the United States;* dependent largely for their daily food; dependent for their political rights.

They owe no allegiance to the states and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. *From this very weakness and helplessness*, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the *duty of protection*, and with it the power. This has always been recognized by the executive and by congress, and by this court whenever the question has arisen." It had accordingly been said in the case of Worcester v. Georgia, 6 Peters, 515, 583: "The language used in treaties with the Indians should never be construed to their prejudice. * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."

The recognized relation between the parties to this controversy, therefore, is that between a *superior and an inferior*, whereby the latter is placed *under the control of the former*, and which, while it authorizes the adoption, on the part of the United States, of such a policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection. *The parties are not on an equal footing;* and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules, framed under a system of municipal jurisprudence formulating the rights and obligations of private persons equally subject to the same laws.

The relation between these parties, recognized by the parties themselves and by this court, is not merely that of knowledge to ignorance,—of book-learning to illiteracy. It is the relation between power and weakness,—between sovereign and dependent,—between guardian and ward. More than that, in the Fort Smith council, during the negotiation of the treaty of 1866, the sword of sovereignty was suspended over the heads of the Choctaws and Chickasaws. They were notified at the outset, by the commissioners of the United States, that they had *forfeited all right* to annuities, lands and protection. To give emphasis to this threat, it was repeated, and, besides, the Choctaws and Chickasaws were told that the proposed treaty *must* contain substantially the seven stipulations set forth in the address of the commissioners.

The following paragraph of President Cooley's address delivered to the Indians, on the first day of the council,

September 8, 1865, is reported by himself on page 297 of the "Report of the Commissioner of Indian Affairs for 1865," and is also reported, by Mr. Mix, the secretary of the council, on page 314 of the same volume:

> Portions of several tribes and nations have attempted to throw off their allegiance to the United States, and have made treaty stipulations with the enemies of the government, and have been in open war with those who remained loyal and true, and at war with the United States, all such have rightfully *forfeited* all annuities and interests in the lands in the Indian territory; but, with the return of peace, after subduing and punishing severely, in battle, those who caused the rebellion, the president is willing to hear his erring children in extenuation of their *great crime*.

In his address to the Indians, delivered on the second day of the council, President Cooley used the following language, as reported by himself, on page 298 of the annual report for 1865, and by Secretary Mix, on page 318 of the same volume:

> The following-named nations and tribes have by their own acts, by making treaties with the enemies of the United States, at the dates hereafter named, *forfeited all right* to annuities, lands and protection by the United States.

On page 34 of the Report of the Commissioner of Indian Affairs for 1865, Mr. Cooley says:

> Immediately upon the opening of the proceedings, the tribes were informed generally of the objects for which the commission had come to them; that they, for the most part, as tribes, had, by violating their treaties, by making treaties with the so-called Confederate States, *forfeited all rights* under them, and must be considered as *at the mercy of the government*.

If an individual, being a guardian, claims to have acquired, for a mere pittance, valuable property of his ward, will not a court of equity interpose for the protection of the ward, either by adjudging the guardian a trustee of the ward as to all his gains from the transaction, or by setting aside the bargain altogether? Will not this be done, even though the guardian impose no restraint, no compulsion, no duress, upon the ward, in the transaction? Will not a court of equity interpose, with yet greater alac-

rity, for the protection of the ward, when the hard bargain has been wrung from him by intimidation and duress?

Is this contest, between the United States and the Choctaw and Chickasaw nations, to be governed by a code of equity rules different from those which are observed in a contest between individuals? When a nation voluntarily enters a court of equity, does it appear exempt from the rules of equity which are binding on other parties? Does not the nation, *pro hac vice*, lay aside the mantle of sovereignty, and stand on the same footing as any other party to the suit?

VIII.

Acknowledgment of the trust by Congress.

The following provision of the act of March 3, 1891, is an *acknowledgment of the trust by the trustee:*

> Said lands have been *ceded, in trust*, by article three of the treaty between the United States and the said Choctaw and Chickasaw nations of Indians, which was concluded April 28, 1866, and proclaimed on the tenth day of August, of the same year. 26 Stat. 1025.

At common law, a trust, in a conveyance of land by one private person to another, could be created by parol, and could also be proven by parol evidence. Under the English statute of frauds, trusts of lands could be created by parol, but could only be proven by written evidence. Trusts, like uses, are, of their own nature averrable, *i. e.*, may be declared by word of mouth without writing; as if, before the statute of frauds, an estate had been conveyed unto, and to the use of, A and his heirs, a trust might have been raised, by parol, in favor of B. And the statute of frauds will be satisfied if the trust can be manifested, or proved, *by any subsequent acknowledgment by*

the trustee, as by an express declaration, or any memorandum to that effect, or by a letter under his hand, or by his answer in chancery, or by his affidavit, or by a recital in a bond, or deed, or by a pamphlet written by the trustee, or by an entry in a bank deposit book; in short, by any writing in which the fiduciary relation of the parties and its terms can be clearly read. Lewin on Trusts, 1st Amer. from 8th Eng. Ed. pp. 51, 55, 56; cases cited and notes; Perry on Trusts, vol. 1, sec. 82, and cases cited; 4 Kent Com. 305 and cases cited; 1 Greenl. Ev. sec. 266, and cases cited; Osterman *v.* Baldwin, 6 Wall. 116; Foy *v.* Foy, 2 Hayw. 141.

A trust, once acknowledged, becomes an integral part of the deed. It cannot be shorn from the deed by the trustee, any more than can any other part of the instrument. When the beneficiary of the trust demands the proceeds of the trust, or the creator of the trust insists upon its faithful execution, the trustee cannot rescind his acknowledgment and retain, in his own purse, the money which belongs to the *cestui que trust*, or extinguish the rights of the reversioner of the estate.

The trust, upon which the leased district was ceded to the United States, is expressly acknowledged by the trustee, in the act of 1891. The acknowledgment is made by those departments of the government, which are invested with the exclusive power to make such acknowledgment. It takes the form of an act of congress, approved by the president of the United States. It is impossible to conceive of a stronger case of the proof of a trust, by the acknowledgment of the trustee. This acknowledgment was not revocable by any subsequent inconsistent action of congress. It permanently fastened upon the United States the character of trustee.

IX.

The jurisdictional act of March 2, 1895, does not "controvert" the claim of the Choctaws and Chickasaws.

This act contains the following words:

> That as the Choctaw and Chickasaw nations claim to have some right, title, and interest in and to the lands ceded by the foregoing agreement, which claim is *controverted by the United States*, jurisdiction be, and is hereby, conferred upon the court of claims to hear and determine the said claim of the Choctaws and Chickasaws: * *And provided further*, That *nothing in this act shall be accepted or construed as a confession that the United States admit* that the Choctaw and Chickasaw nations have any claim to or interest in said lands, or any part thereof. 28 Stat. 893; Appendix to Rec. 1.

Our opponents understand these words to mean that congress controverted this claim. We do not so understand them. When the assistant attorney general controverts claims, in the court of claims, in "common parlance" the United States controverts them. In the case at bar, a former secretary of the interior controverted the Choctaw and Chickasaw claim. Adopting "common parlance," congress said that the United States controverted the claim.

If we understand the meaning of the act to be that the secretary controverted this claim, and that the act itself was not to be construed as an admission, *by congress*, of the validity of the claim, the provision is intelligible and sensible. But understood as our opponents understand it, it becomes absurd. It amounts, in effect, to this:

Congress *denies* the validity of the claim, provided this *denial* of its validity shall not be construed as an *admission* of its validity.

X.

The use made of the leased district by the United States from the date of the treaty of 1866, *until* 1890.

During the twenty-four years that followed the date of the cession of the leased district, by the Choctaws and Chickasaws, to the United States, no use was made of any part of that district, except for the settlement of Indians. This would seem to be strong if not conclusive proof that the United States understood, at the date of the treaty, and for a quarter of a century thereafter, that the treaty conferred no right to use the land for any other purpose.

XI.

Unjust discrimination in favor of the Creeks, Seminoles and Cherokees.

A denial of compensation to the Choctaws and Chickasaws, for their interest in the Wichita reservation, would present an indefensible discrimination in favor of the Cherokees, Creeks and Seminoles, and against the Choctaws and Chickasaws. In 1866 the United States paid the Creeks for their cession in trust $975,168, and in 1889 paid them $2,280,857.19 for an absolute title to the same land. House Report No. 3147, 51 Cong., 1 sess., pp. 13, 14. In 1866 the United States paid the Seminoles $325,362 for their cession in trust and in 1899 paid them for an absolute title to the same land $1,912,942.02. Id. p. 14. In 1891 the United States paid the Cherokees $8,000,000 for their interest in the "Cherokee Outlet."

XII.

The western boundary of the province ceded by France to the United States in 1803.

A question which has been discussed at considerable length, on both sides, is the question whether the territory ceded by the United States to the Choctaws, in 1820, extended westward beyond the 100th meridian of west longitude. It is material in this case only because of the bearing which its decision may have on the question whether the sum of $800,000, or the sum of $400,000, or some other sum, was paid for the lease, in 1855. In order to decide this question as to the extent of the territory ceded to the Choctaws, in 1820, it becomes necessary to ascertain whether, at the date of the Choctaw treaty of 1820, the United States owned any land west of the 100th meridian.

The province of Louisiana, ceded by France to the United States in 1803, extended from the Mississippi river, on the east, to the Rio Bravo del Norte, and Rocky Mountains on the west, and from the Gulf of Mexico, northward, beyond the fortieth parallel of north latitude. This is shown by the following documentary proofs:

A letter of instructions from James Madison, secretary of state, to Robert R. Livingston, minister to France, written within nine months after the cession of Louisiana to the United States, contains the following paragraph:

DEPARTMENT OF STATE, *January* 31, 1804.

SIR: With respect to the western extent of Louisiana, M. Loussat held a language more satisfactory. He considered the Rio Bravo or Del Norte, as far as the thirtieth degree of north latitude, as its true boundary on that side. The northern boundary, we have reason to believe, was settled between France and Great Britain by commissioners appointed under the treaty of Utrecht, who separated the British and French territories west of the Lake of the Woods by the forty-ninth degree of

latitude. American State Papers, Foreign Affairs, vol. 2, p. 574; Appendix to Record, p. 70.

This statement is repeated on page 575, in a subsequent letter from Mr. Madison to Mr. Livingston, dated March 31, 1804. M. Loussat was the commissioner who received the transfer of the province of Louisiana from Spain to France, and transferred it to the United States under the treaty of 1803.

James Madison, secretary of state, in his letter of instructions of April 15, 1804, to James Monroe and Charles Pinckney, ministers extraordinary to the court of Spain, says:

No final cession is to be made to Spain of any part of the territory on this side of the Rio Bravo, but in the event of a cession to the United States of the territory east of the Perdido; and, in that event, in case of absolute necessity only, and to an extent that will not deprive the United States of any of the waters running into the Missouri or the Mississippi, or of the other waters emptying into the Gulf of Mexico, between the Mississippi and the river Colorado emptying into the bay of St. Bernard.

American State Papers, Foreign Affairs, vol. 2, p. 630; Appendix to Record, p. 71.

The bay of St. Bernard is now known as Matagorda bay.

A letter of instructions from James Madison, secretary of state, to James Monroe and Charles Pinckney, ministers extraordinary to the court of Spain, dated July 8, 1804, contains the following paragraph:

It is to be understood that a perpetual relinquishment of the territory between the Rio Bravo and Colorado is not to be made, nor the sum of —— dollars paid, without the entire cession of the Floridas, nor any money paid in consideration of the acknowledgment by Spain of our title to the territory between the Iberville and the Perdido.

American State Papers, Foreign Affairs, vol. 2, p. 630; Appendix to Record, p. 71.

In a letter from James Monroe, minister extraordinary to Spain, to M. Talleyrand, a minister of the French Empire, dated Paris, November 8, 1804, he says:

Your excellency will receive within a paper containing an examination of the boundaries of Louisiana which, it is presumed, proves incontestably the doctrine above advanced, as also that the river Perdido, is the ancient, and, of course, present boundary of that province to the east, and the Rio Bravo to the west.

American State Papers, Foreign Affairs, vol. 2, p. 643; Appendix to Record, p. 72.

In a letter from the American ministers, Monroe and Pinckney, to the Spanish minister Cevallos, dated January 28, 1805, they say:

We have the honor to present to your excellency a paper on this subject which we presume proves in the most satisfactory manner that the boundaries of that province, as established by the treaties referred to, are the river Perdido to the east and the Rio Bravo to the west. The facts and principles which justify this conclusion are so satisfactory to our government as to convince it that the United States have not a better right to the island of New Orleans, under the cession referred to, than they have to the whole district of territory which is above described.

American State Papers, Foreign Affairs, vol. 2, p. 637; Appendix to Record, p. 72.

A letter from the American ministers, Messrs. Monroe and Pinckney, to the Spanish minister, dated April 20, 1805, contains the following paragraphs:

By the memorial which we had the honor to present to your excellency on the 28th of January last, the epoch of the discovery of the Mississippi and of the waters which empty into it and of the bay of St. Bernard, and of the taking possession of same and of the country dependent thereon, is proved by documents which can not be questioned. By these it is established, in respect to the Mississippi, its waters, and dependent country, as low down the river as the Arkansas by Messieurs Joliet and Marquette from Canada as early as the year 1673, and to its mouth by the Father Henison in 1680, and by De la Salle and Joutel, who descended the river with sixty men to the ocean and named the country Louisiana, in 1682; and in respect to the bay of St. Bernard in 1685. This was done, at those periods, in the name and under the authority of France, by acts which proclaimed her sovereignty over the whole country to other powers in a manner the most public and solemn, such as making settlements and building forts within it. Of these it is material to notice in the present inquiry two only, which were erected in the bay of St. Bernard, on the western side of the river Colorado, by M. de la Salle, who landed there from France with two hundred and forty persons in 1685.

The principles which are applicable to the case are such as are dictated by reason and have been adopted, in practice, by European powers, in the discoveries and acquisitions which they respectively made in the New World; they are principles intelligible and at the same time founded in strict justice. The first of these is that when any European nation takes possession of any extensive seacoast, that possession is understood as extending into the interior of the country to the sources of the rivers emptying within that coast, to all their branches and the country they cover, and to give it a right in exclusion of all other nations to the same. * * * The second is that whenever one European nation makes a discovery and takes possession of any portion of that continent, and another afterwards does the same at some distance from it, where

the boundary between them is not determined by the principle above mentioned, the middle distance becomes such of course. The justice and propriety of this rule is too obvious to require illustration. A third rule is that whenever any European nation has thus acquired a right to any portion of territory on that continent, that right can never be diminished or affected by any other power, by virtue of purchases made, by grants, or conquests of the natives within the limits thereof. It is believed that this principle has been admitted and acted on invariably since the discovery of America, in respect to their possessions there, by all the European powers. * * *

On the authority of the principle first above stated it is evident that, by the discovery and possession of the Mississippi, in its whole length, and the coast adjoining it, the United States are entitled to the whole country dependent on that river, its several branches, and the waters which empty into it within the limits of that coast. The extent to which this would go it is not in our power to say; but the principle being clear, dependent on plain and simple facts, it would be easy to ascertain it.

It is equally evident by the application of the second principle to the discovery made by M. de la Salle of the bay of St. Bernard, and his establishment there on the western side of the River Colorado, that the United States have a just right to a boundary founded on the middle distance between that point and the then nearest Spanish settlement, which, it is understood, was in the province of Panuco, unless that claim should be precluded on the principle first above mentioned. To what point that would carry us it is equally out of our power to say, nor is it material, as the possession in the bay of St. Bernard, taken in connection with that of the Mississippi, has been always understood as a right to extend to the Rio Bravo, on which we now insist.

American State Papers, Foreign Affairs, vol. 2, pp. 663, 664; Appendix to Record, p. 73.

A letter from James Monroe, secretary of state, to the Chevalier de Onis, the Spanish minister, dated June 10, 1816, contains the following paragraph:

DEPARTMENT OF STATE, *June* 10, 1816.

SIR: * * With respect to the western boundary of Louisiana I have to remark that this government has never doubted, since the treaty of 1803, that it extended to the Rio Bravo. Satisfied I am, if the claims of the two nations were submitted to an impartial tribunal, who, observing the principles applicable to the case, and tracing facts as to discovery and settlement, on either side, that such would be its decision. The discovery of the Mississippi, as low down as the Arkansas, in 1673, and to its mouth, in 1680, and the establishments of settlements on that river, and on the bay of St. Bernard on the western side of the Colorado, in 1685, under the authority of France, when the nearest settlement of Spain was in the province of Panuco, are facts which place the claim of the United States on ground not to be shaken.

American State Papers, Foreign Affairs, vol. 4, p. 430; Appendix to Record, p. 77.

Mr. John Quincy Adams, secretary of state, in his letter

of March 12, 1818, to Mr. de Onis, the Spanish minister at Washington, said:

The claim of France always did extend westward to the Rio Bravo, and the only boundaries ever acknowledged by her before the cession to Spain of November 3, 1762, were those marked out in the grant from Louis XIV to Crozat. She always claimed the territory which you call Texas as being within the limits and forming a part of Louisiana, which in that grant is declared to be bounded westward by New Mexico, eastward by Carolina, and extending inward to the Illinois and to the sources of the Mississippi and of its principal branches.

The boundaries of Louisiana, Mr. Adams says, are established by the following proofs:

(1) The discovery of the Mississippi, from near its source to the ocean, by the French from Canada, in 1683.

(2) The possession taken, and establishment made, by La Salle, at the bay of St. Bernard, west of the rivers Trinity and Colorado, by authority from Louis XIV, in 1685.

(3) The charter of Louis XIV to Crozat, in 1712.

(4) The historical authority of Du Pratz and Champigny, and of the Count de Vergennes.

(5) The geographical authority of De l'Isle's map, and especially that of the map of Don Thomas Lopez, geographer to the King of Spain, published in 1762. These documents were all referred to in the letter from Messrs. Pinckney and Monroe to Mr. Cevallos, of 20th April, 1805, since which time, and in further confirmation of the same claims, the government of the United States is enabled to refer you to the following:

(6) A map published by Homann, at Nuremberg, in 1712.

(7) A geographical work published in 1717, at London, entitled "Atlas Geographicus, or a Complete System of Geography, Ancient and Modern;" in which the map of Louisiana marks its extent from the Rio Bravo to the Perdido. In both these maps the fort built by La Salle is laid down on the spot now called Matagorda.

(8) An official British map published in 1755 by Bowen, intended to point out the boundaries of the British, Spanish, and French colonies in North America.

(9) The narrative published at Paris, of Hennepin in 1683, of Tonti in 1697, and of Joutel in 1713.

(10) The letter from Col. la Harpe to Don Martin d'Alarconne of 8th July, 1719 (A 1, B 2).

(11) The order from the French governor of Louisiana, De Bienville, to La Harpe of August 10, 1721 (C 3).

(12) The geographical work of Don Antonio de Alcedo, a Spanish geographer of the highest eminence; this work and the map of Lopez, having been published after the cession of Louisiana to Spain in 1762, afford decisive evidence of what Spain herself considered as the western boundary of Louisiana when she had no interest in contesting it against another State (B 4).

Mr. Adams cites the following proofs on the part of Spain:

(1) The voyages of Ponce de Leon, Vasquez de Ayllon, Panfilo de Narvaez, Fernando de Soto, Luis Moscoso, and other Spanish travelers in the 16th century, who never made any settlement upon any of the territories in question, but who traveled, as you observe, into countries too tedious too enumerate.

(2) The establishment of the new kingdoms of Leon and Santander in 1595, and the province of Cohaquila in 1600.

(3) The province of Texas founded in 1690.

Here, you will please to observe, begins the conflict with the claims of France to the western boundary of Louisiana transferred by the cession of the province to the United States. The presidios or settlements of Las Texas were, by your own statement, adverse settlements to that of La Salle, who, six years before, had taken formal possession of the country in the name of and by authority of a charter from Louis XIV. They were preceded by an expedition from Mexico the year before, that is, 1689, to hunt out the French remaining of the settlement of La Salle. Now, what right had the viceroy of Mexico to hunt out the French who had formed a settlement under the sanction of their sovereign's authority? You will tell me that from the time when Santa Fe, the capital of New Mexico, was built Spain considered all the territory east and north of that province, as far as the Mississippi and the Missouri, as her property; that the whole circumference of the Gulf of Mexico was hers; and that Philip II had issued a royal order to exterminate every foreigner who should dare to penetrate to it; so that the whole question of right between the United States and Spain with regard to this boundary centers in this: the naked pretension of Spain to the whole circumference of the Gulf of Mexico, with the exterminating order of Philip II on one side; and the actual occupancy of France, by a solemn charter from Louis XIV, on the other. Well might Messrs. Pinckney and Monroe write to Mr. Cevallos, in 1805, that the claim of the United States to the boundary of the Rio Bravo was as clear as their right to the island of New Orleans. * * *

From this work of Joutel it likewise appears that the fort and colony left by La Salle at the westward of the Colorado was destroyed, not as you state by the Indians, but by the Spaniards from Mexico, who, until that time, had never had any settlement of any kind nearer than Panuco, and who, by your own account, had no other right or authority for this act than the royal order of Philip II to exterminate all foreigners penetrating into the Gulf of Mexico.

The settlement of La Salle, therefore, at the head of the bay of St. Bernard, westward of the river, which he called Riviere aux Bœufs, but which you call Colorado of Texas, was not, as you have represented it, the unauthorized incursion of a private adventurer into the territories of Spain, but an establishment having every character that could sanction the formation of any European colony upon this continent, and the viceroy of Mexico had no more right to destroy it by a military force than the present viceroy would have to send an army and destroy the city of New Orleans. It was a part of Louisiana discovered by La Salle under formal and express authority from the King of France; and the royal exterminating order of Philip II was but one of the multitude of sanguinary acts which signalized the reign and name of that monarch, while the name of La Salle is entitled to stand high in the glorious role of the benefactors of mankind. After this statement, founded upon the most authentic documents, the foundation of the presidio of Texas, in 1693, was, by your own showing, an unlawful enroachment upon the

territories of France which, by the first of the three principles laid down by Messrs. Pinckney and Monroe at Aranjuez, and above referred to, extended, on the coast of the Gulf of Mexico, half way to the nearest Spanish settlement of Panuco, viz., to the Rio Bravo.

American State Papers, Foreign Affairs, vol. 4, pp. 471, 473, 478, 479; Appendix to Record, pp. 78 to 84.

A letter from John Quincy Adams, secretary of state, to Don Luis de Onis, the Spanish minister, contains the following paragraphs:

DEPARTMENT OF STATE, WASHINGTON, *October* 31, 1818.

SIR: Your letter of the 24th instant, and the proposals contained in it, offered as the basis of a treaty for the adjustment of all the subjects in discussion between the United States and Spain, have been received and laid before the president of the United States.

I am directed by him to forbear entering into any examination of the historical disquisition, concerning the original pretensions of Spain to all the territories bordering on the Gulf of Mexico and the whole country included in the French colony of Louisiana, which you have thought proper to introduce into your note. The right of the United States to the river Mississippi and all the waters flowing into it, and to all the territories watered by them, remains as entire and unshaken by anything now adduced by you, as by anything which had ever preceded it, in the discussions between the two governments. It is established, beyond the power of further controversy; nor could it answer any useful purpose to reproduce proofs which have already, more than once, been shown, and which, remaining unimpaired, must henceforth be considered by the United States as not susceptible of refutation.

American State Papers, Foreign Affairs, vol. 4, p. 530; Appendix to Record, p. 78.

The western boundary is also shown to have been west of the 103d meridian by the following maps:

De l'Isle's map, Paris, 1703. Rec. p. 78, Diagram 124.

Senex's map, London, 1710. Rec. 78, Diagram 127.

Moll's map, London, 1711. Rec. p. 80, Diagram 130.

Moll's map, London, 1715. Rec. p. 80, Diagram 133.

De l'Isle's map, Amsterdam, 1720. Rec. p. 82, Diagram 145.

De l'Isle's map, Amsterdam, 1722. Rec. p. 83, Diagram 147.

Popple's map, London, 1733. Rec. p. 84, Diagram 153.

Popple's map, London, 1735. Rec. p. 84, Diagram 156.

De l'Isle's map, Amsterdam, 1739. Rec. p. 85, Diagram 159.

De l'Isle's map, Amsterdam, 1741. Rec. p. 82, Diagram 142.

Boehme's map, 1846. Rec. p. 85, Diagram 162.

De l'Isle's Atlas Nouveau, vol. 2, No. 33. Rec. p. 88, Diagram 181.

Popple's map, about 1737. Rec. p. 89, Diagram 184.

G. L. Le Rouge, Paris, 1778. Rec. p. 86, Diagram 168.

Du Val's map, Paris, 1684. Rec. p. 90, Diagram 187.

Lea's map, London, about 1685. Rec. p. 90, Diagram 190.

Bernard's map, Amsterdam, 1720. Rec. p. 91, Diagram 196.

This is also shown by ten of the fourteen maps appended to the counsel's brief, viz: Nos. 1, 2, 3, 4, 5, 6, 7, 11, 13 and 14.

XIII.

The western boundary of the land ceded, by the United States, to the Choctaws, in 1820.

The territory ceded in 1820 by the United States to the Choctaws is bounded in the second article of the treaty as follows:

> Beginning on the Arkansas river, where the lower boundary line of the Cherokees strikes the same; thence up the Arkansas to the Canadian Fork, and up the same to its source; thence due south to the Red river; thence down Red river three miles below the mouth of Little river, which empties itself into Red river, on the north side; thence a direct line to the beginning. 7 Stat. 210.

The longitude of the source of the Canadian is 103° 30′. Our opponents contend that this treaty did not extend the north line of the cession beyond the 100th meridian. They base this view of the treaty upon the following grounds:

1. In 1820 the source of the Canadian "was universally believed to be the source of the Red river."

2. On no map, extant in 1820, was the source of the Canadian located west of the 100th meridian.

3. In 1820 the source of the Canadian was located "about the 100th meridian," on the maps of Pike, Melish, Darby, Arrowsmith, and Pinkerton, which were "the standard maps of the day."

4. Although no meridians of longitude are numbered, on the so-called Quapaw "treaty map," yet the source of the Canadian must be located, on that map, at 100° west longitude, because that map somewhat resembles Pike's, and on Pike's the source of that river is located at 100° 20′ or 100° 5′ west longitude.

5. "Although the only boundary lines which are specifically referred to in the treaty, as being 'on the above map,' are those which bounded the eastern portion of the cession," there can be no doubt that the parties to the treaty intended to make the 100th meridian the western boundary of the treaty.

6. The Quapaw cession only extended westward to the 100th meridian, and, therefore, the Choctaw cession only extended westward to that meridian.

7. The treaty of 1820 was rescinded by the treaty of 1830, and, therefore, the cession of 1820 only extended to the 100th meridian.

8. Although the letter of Major Long, locating the source of the Canadian west of the 103d meridian, had been on file in the proper department, from one to two months, there is no express proof that the president or secretary read it before the ratification of the Choctaw treaty of 1820.

9. The land west of the 100th meridian was ceded to Spain in 1821, and, therefore, the United States could not have ceded, or intended to cede it, to the Choctaws, by the treaty of 1820.

10. The Choctaws did not demand possession of this land until 1854.

These contentions of counsel are considered on pages 41 to 48 of this brief and on pages 76 to 118 of my brief in cause No. 338, The Wichita and Affiliated Bands of Indians *v.* The Choctaw Nation *et al.*

XIV.

Reply to statements of the appellant's brief.

The opinion of the court below (Rec. 392) states that certain maps "did in fact delineate the stream subsequently known as the Canadian, with its source west of the one hundredth meridian." This statement, which it is submitted is erroneous, will be discussed in the argument. Page 4.

The following is the statement of the court of claims:

While it may be true that no map, published prior to 1820, delineated the Canadian river *by that name*, with its source west of the 100th meridian, yet there were maps in existence which did, in fact, delineate the stream *subsequently known* as the Canadian, with its source west of the 100th meridian.

It is true that when De l'Isle's map of 1720 was published, 180 years ago, the Canadian river had not received its present name. But it is also true that the Arkansas and the Canadian are both delineated *with great accuracy*, not only on that map, but also on De l'Isle's map of 1739, and on Boehme's map of 1746, copies of which are appended to the counsel's brief. Those maps clearly and unmistakably exhibit a south branch of the Arkansas, corresponding exactly with the stream now known as the Canadian, and having its source, not only west of the 100th meridian, but west of the 104th meridian. The second map appended to his brief is De l'Isle's map of the western hemisphere, published in 1720. It places the source of the Canadian west of 274°, Ferro longitude, which is reduced to Greenwich longitude by subtracting

274° from 360° and adding 18° 9′ to the remainder, the result being 104° 9′. The fourth map appended to his brief is De l'Isle's, published in Amsterdam in 1739, and the fifth is A. G. Boehme's, published in 1746. On both of these maps, as on the one just referred to, rivers corresponding closely to the Arkansas and Canadian, are delineated with the source of the Canadian west of 274° Ferro, or 104° Greenwich longitude.

When this treaty (Quapaw treaty of 1818) was made, the real source of the Canadian fork of the Arkansas, or, as it is now called, the Canadian river, was *universally believed* to be the source of the Red river (called in the treaty "Big Red river"), and the Canadian was itself *universally supposed* to be a comparatively short stream, rising *at or slightly east of* the one hundredth meridian. Page 4.

The *standard maps* of the day placed the source of the Canadian *about* the one hundredth meridian. As to the authority of Pike's chart, it may fairly be said to have been, in spite of all its defects, the *best map* of that particular region that had yet been made. That it was generally received as authority is shown by the fact that it was *substantially followed, in all later maps, both English and American*, until the actual geography of the region was discovered and made known by Major Long. Page 59.

The counsel proceeds to name the four other "standard maps," Pike's being the *standard of standards*. They are Melish's, 1816; Darby's, 1818; Pinkerton's, 1815; and Arrowsmith's, 1816; and they are the tenth, eleventh, thirteenth and fourteenth of the maps appended to the counsel's brief. Pike's "chart," in two parts, embraces the eighth and ninth appended maps. What is meant by the assertion that the source of the Canadian was *universally* believed to be the source of the Red river? The word "universally" is a word of very broad signification. Does the counsel mean that this belief was entertained throughout the entire universe, or that everybody on earth believed that the sources of the Red and Canadian rivers were identical? Probably not. But if he meant anything pertinent to this case, he meant that this belief was general, not only

among the people of the United States, but also among the Choctaws and Chickasaws,—for the Choctaws and Chickasaws are to be reckoned with in this business. And yet, even in that limited sense, the word is absolutely unwarranted by the facts. Not one person in one thousand in the United States believed that the sources of the Red and Canadian rivers were identical, or entertained any belief whatever on the subject. Not a single Indian in the southwest believed that the source of the Red river was the source of the Canadian. The counsel thinks his "standard maps" prove his assertion. Let us inspect those maps. On not one of them is the source of the Canadian made the source of the Red river. On not one of them is the source of the Canadian located at the 100th meridian. On the eighth appended map Pike locates the source of the Canadian at 100° 12′ west longitude and 33° 20′ north latitude. On the ninth appended map he locates the source of the Red river at 110° 5′ longitude and 38° 20′ latitude. Instead of being identical these two river heads are separated by ten degrees of longitude, or 565 miles, and by five degrees of latitude, or 282 miles. Moreover, the route of the Spanish cavalry that marched from Santa Fé, to capture Pike, in 1806, is delineated, by Pike, along the north bank of Red river, from its source downwards.

On the ninth map appended to the counsel's brief, Pike makes the longitude of Santa Fe 110° 45′. But his four disciples, by whom he is "substantially followed," make the longitude respectively 105° 30′, 106° 30′, 104° 50′, and 104° 25′. Between Pike's "standard" and his disciples' "standards," there is a difference of six degrees of longitude, amounting in that latitude to 340 miles. The true longitude, as indicated on the Land Office map for 1897, is 106°.

A comparison of the general course of Pike's Canadian river with the general course of that river, as delineated by his *followers*, can hardly fail to amuse the court. The *general course* laid down by Pike, on the eighth of the counsel's maps, is nearly straight from southwest to northeast. But upon the tenth and eleventh appended maps, Darby's and Melish's, the Canadian is shaped like a new moon, with both horns pointing upwards. While Pike has dropped the source of the Canadian down two degrees, or 120 miles below its mouth, its source on Melish's map is higher than its mouth, and it first descends 30 miles and then rises nearly 30 to its mouth; and on Pinkerton's map, its source being 20 miles lower than its mouth, it descends 30 miles and then rises 50 miles to its confluence with the Arkansas.

On the counsel's eighth appended map Pike makes the *latitude* of the source of the Canadian 33° 10′ north. But the tenth, Darby's, makes it 35° 15′, the thirteenth makes it 33° 52′, and the fourteenth, Pinkerton's, makes it 33° 42′. Between Pike and his followers there is a difference of 2° 5′, or 125 miles.

Pike makes the longitude of the mouth of the Arkansas 91° 54′, and the distance between Santa Fe and the mouth of the Arkansas 18° 51′, or 1,003 miles. But on the tenth appended map (Darby's) that distance is only 14° 30′, or 822 miles; on the eleventh (Melish's) it is 15° 20′, or 869 miles; on the thirteenth it is 13° 40′, or 775 miles; and on the fourteenth (Pinkerton's) it is 13° 45′, or 779 miles. Pike and his followers differ to the extent of 289 miles.

On the counsel's eighth appended map, Pike makes the longitude of the mouth of the Canadian 96° 45′. The counsel's tenth map (Darby's) makes it 96° 25′; his eleventh (Melish's) 97° 5′; his thirteenth, 94° 45′; and his four-

eenth (Pinkerton's) 94° 30′. Its exact longitude is 95° 5′. Pike and his disciples differ here to the extent of 2° 15′, or 126 miles.

Pike, on the counsel's eighth appended map, makes the ongitude of the source of the Canadian, not 100°, but 00° 12′; the tenth (Darby's) makes it, not 100°, but 9° 30′; the thirteenth, not 100°, but 97° 5′, and the four-eenth (Pinkerton's) not 100°, but 97° 15′. Pike and his disciples differ to the extent of 3° 7′, or 176 miles of ongitude, and 13,250 square miles of territory. Such s the precision with which Pike is "*practically followed*" by Melish, Darby, Arrowsmith and Pinkerton.

Having asserted that, in 1818, 1820, "the standard maps of the day" were those of Pike, Melish, Darby, Arrowsmith, and Pinkerton, and that Pike's map was "substantially followed" by the others, he says, on page 57 of his brief:

> The treaty map is based on Pike's chart. * There are no indications of latitude or longitude; but the map is so obviously based on Plate 1 of Pike's chart * * that the latitude and longitude of the latter may properly be referred to in order to show what was meant by the former.

Now, the maps of Arrowsmith and Pinkerton, published in 1815 and 1816, bear as close a resemblance to the so-called "treaty map" as does Pike's. There are no stronger reasons for assuming that Pike's longitudes are to be understood as the longitudes of the "treaty map," than for assuming that Arrowsmith's, or Pinkerton's, are to be so understood. But Arrowsmith locates the source of the Canadian on the meridian of 97° 5′, and Pinkerton on that of 97° 15′, either of which meridians would cut off not only all the land west of 100°, but also all the leased district and most of the Chickasaw nation.

Passing now from the counsel's "*standard maps*" to the maps of De l'Isle and Boehme, we shall seem to emerge from Cimmerian darkness into the clear light of

day. On the second of the maps appended to the counsel's brief, De l'Isle, in 1820, made the longitude of Santa Fe 272° Ferro, or 106° 9′ Greenwich. It is the same on the fourth appended map, which is De l'Isle's map of 1739. It is also the same on Boehme's map of 1746, which is the fifth of the counsel's appended maps. And that is within nine minutes of the exact longitude of Santa Fe, which, as I have stated, is 96°. On each of these maps the source of the Canadian is placed west of 104° 30′, and that of the Red river west of 103° 30′.

But, in point of accuracy, these three derided maps of De l'Isle and Boehme present a still more remarkable contrast with the counsel's "standard maps" of Pike, Melish, Darby, Arrowsmith and Pinkerton. The actual longitude of the mouth of the Canadian is, as I have stated, 95° 5′. Pike, on the counsel's eighth map, makes it 96° 45′, Darby's map makes it 96° 25′, Melish's 97° 5′, the twelfth 94° 45′, and Pinkerton's 94° 30′. But De l'Isle's map of 1720, which is the second appended to the counsel's brief, makes it 282° Ferro, or 95° 9′ Greenwich, which is within four minutes of the true longitude; De l'Isle's map of 1739,—the counsel's fourth map,—and Boehme's map of 1746,—the counsel's fifth appended map,—both make it 82° 25′ Ferro, or 95° 44′ Greenwich, which is within thirty-nine minutes of the true longitude.

The counsel thinks that this accuracy, on the part of De l'Isle and Boehme, was accidental. Pity it is that some accident like unto this could not have befallen Pike and his four disciples. But it was not an accident. The Spaniards reached Santa Fe about 1542. Am. Cyc. v. 16, p. 618. It has been the capital of New Mexico ever since 1640. Its longitude was known, in Madrid and Paris, long before the maps of De l'Isle and Boehme were made. It seems incredible that the sources of the Red

and Canadian rivers, which were so near to Santa Fe, could have been unknown to the Spaniards, for eighty years, or that information on that subject could have been inaccessible to Boehme and De l'Isle. The geographical knowledge of these regions attainable in the United States, in 1720, or in 1818, was as nothing compared with that attainable in Paris and Madrid. Prior to the acquisition of Louisiana by the United States, in 1803, what interest had the American people in the longitude of the sources of the Red and Canadian rivers, any more than in the longitude of the source of the Amazon? What means had they for acquiring knowledge, on the subject, without recourse to Madrid, or Paris, or to European maps?

Upon what rational ground can the counsel contend that these so-called standard maps prove, or tend to prove, that the 100th meridian was the western boundary of the land ceded to the Choctaws, in 1820, or that it was universally believed, prior to 1818, that the source of the Red river was identical with the source of the Canadian? Is that proved by Pike's map, which not only gives different sources to those rivers, but makes the longitude of the source of the Canadian, 100° 12′, instead of 100°, and would carry that cession so far west of the 100th meridian as to add 900 square miles to its area? Is it proved by Darby's,—the tenth appended map,—which, not only represented different sources of the Red and Canadian rivers, but made the longitude of the source of the Canadian, 99° 30′, instead of 100°, and would cut off 2,552 square miles from the western borders of the cession? Is it proved by Melish's, the eleventh of the counsel's "standard" maps, which makes that longitude, not 100°, but 99° 50′, and would cut off 850 square miles from the western part of the cession? Is it proved by the thir-

teenth map, which makes that longitude, not 100°, but 97° 5′, and would cut off from the cession, not only all the land west of the leased district and all the leased district, but also 5,104 square miles from what is now the Chickasaw nation? Is it proved by his fourteenth "standard" map, (Pinkerton's,) which makes that longitude, not 100°, but 97° 15′, and would cut off from the Choctaw cession, not only the leased district and all land west thereof, but also 4,354 square miles of the Chickasaw nation? Is it for the counsel to base upon these maps a contention which is not sustained, or warranted, or excused, or palliated by one of them? Could there be a flimsier pretext for the robbery of an Indian tribe?

On page 92 of his brief, the counsel, referring to the date of the Quapaw treaty, (1818) says:

> No map existed until some time afterwards that showed the source of the Canadian west of the one hundredth meridian.

And yet the counsel himself has appended to his brief three maps, which had existed more than seventy years before the date of the Quapaw treaty, each one of which shows the source of the Canadian west of the 104th meridian. These are the second, fourth and fifth of his appended maps, viz: De l'Isle's maps of 1720 and 1739, and Boehme's map of 1746. But the counsel goes still further in disproof of his own assertion. The eighth map appended to his brief is one of Pike's absurd productions. On this map the source of the Canadian is located west of 100°, on the meridian of 100° 12′, cutting off 900 square miles west of the 100th meridian.

On page 96 the counsel for the United States says:

> By the Spanish treaty the United States relinquished disputed claims, but no territory.

His argument, in maintenance of this assertion, will be found on pages 96 to 107 of his brief. The upshot of it is this: The United States could not have ceded any territory by that treaty, because during its negotiation the Spanish minister, Mr. de Onis, denied that the territory of the United States extended westward to the Rio Bravo del Norte, and, therefore, so far as territory west of the Mississippi was concerned, the treaty was a mere delimitation of boundaries. But, as shown on pages of this brief, and on pages 79, 80, and 81 of my brief in cause No. 338, the fact is that in 1685 the province of Louisiana, extending from the Mississippi to the Rio Bravo, became the property of France by the right of discovery, was ceded by France to Spain in 1762, was retroceded to France in 1800, and was ceded by France to the United States in 1803. The pretensions set up by Mr. de Onis, for the purpose of securing a high price for Florida, did not change the facts of history, nor touch the title of the United States. Nor did they have the effect to convert the cession of Texas to Spain into a mere delimitation of boundaries. De Onis himself subsequently stated, in a printed memoir, that Spain had acquired Texas in exchange for Florida. (Am. St. Papers, For. Rel. v. 4, p. 693.) I have considered this subject on pages 104 and 105 of my brief in No. 338.

On page 108, the counsel says:

Some oratory was expended against the treaty in Congress.

This remark of counsel is aimed at a "party" of the name of Henry Clay, by whom "oratory was expended," in the House of Representatives, on the 3d of April, 1820, as follows:

It results then that we have given for Florida, charged and encumbered as it is, first, unincumbered Texas; second, $5,000,000; third, a sur-

render of all our claims upon Spain not included in that five millions; and fourth, if the interpretation of the treaty which he had stated were well founded, about 1,000,000 acres of the best unseated land in the State of Louisiana, worth perhaps $10,000,000. Ann. Cong. 16 Cong. 1 Sess. v. 2, pp. 1691, 1724, 1725, 1726, 1729, 1730, 1731; Appendix to Rec. 199.

On page 111 of his brief, the counsel says:

The ceding country cannot grant lands in the ceded territory, even before ratification. The reason for this has been stated by this court as follows: "After the treaty is made there is not in either (the ceding country, or the country receiving the cession) the union of possession and the right to the territory, which must concur to give *plenum dominium et utile*. To give that there must be the *jus in rem* and the *jus in re*, or what is called in the common law of England the *juris et seisinae conjunctio*." Davis *v.* Police Jury, 9 How. 280, 289.

The counsel misunderstands both the rule and the authority cited. The rule is that, as between the parties to a ratified treaty, its date is the date of signing; but as to other parties, not advised of the signing and provisions of the treaty, its date is the date of exchange of ratifications. A treaty of cession signed last, but ratified first, will override a treaty signed first, but ratified last, provided the grantee in the treaty first ratified had no notice of the signing and contents of the other. The title to the land will vest in the grantee of the cession first ratified. The right of the other grantee will be a right, not to the land itself, but to compensation for damages incurred,—such compensation to be secured by stipulation, or by war, or otherwise. United States *v.* Arredondo, 6 Pet. 691; Haver *v.* Yaker, 9 Wall. 32, 34.

In Davis *v.* Police Jury, 9 How. 280, (cited by counsel) the facts were these: The treaty of St. Ildefonso, by which Spain ceded Louisiana to France, was signed October 1, 1800, and ratifications were exchanged. But the ceremony of formally delivering that province to Louisiana was not performed until November 30, 1803, exactly seven months after the date of the treaty by which France ceded the province to the United States. On the 19th of February, 1801, the privilege of a ferry across the

Mississippi between Natchez and Vidalia was conceded to Thomas Thompson by Calvo, the Spanish governor of Louisiana. It was not a cession of territory effected by a treaty between two nations, but a ferry privilege granted by a subordinate officer to a subject. The question was whether the ferry privilege overrode *pro tanto* the cession of 1800 from Spain to France, and the cession of 1803 from France to the United States. It was not a question between a cession of territory signed first and ratified last, and another cession of the same territory signed last and ratified first, the grantee in the treaty first ratified having no notice of the fact, date and tenor of the other treaty. It was a question between a cession of a province signed first and duly ratified, and a ferry privilege signed last and never ratified. The decision of the court was merely an enunciation of one of the doctrines of the cases of United States *v.* Arredondo, and Haver *v.* Yaker, cited on pages 113 and 114 of my brief in No. 338; Wichita Band *et al. v.* Choctaw Nation *et al.*

The counsel asserts, on page 75, that my tracing on No. 29, opposite page 82 of the record, "shows the confluent as much longer than the main stream, which the orignal map does not do." This is an error. The original map, from which my tracing was made, is the same map of which his second appended map purports to be a copy. On his map and on my own the stream, now called the Canadian, is delineated as shorter than the stream called the Arkansas. Whichever stream the counsel prefers to call the "main stream," his map and mine are, on this point, alike.

The cession of the "leased district," in 1866, being absolute on its face, the court below had no jurisdiction to go behind the plain words of cession, and inquire into any supposed intention of the parties to the treaty of 1866, to create a trust in the land ceded. Page 24.

The word "cede," standing unqualified in a treaty, may, as I have said, import a transfer of paramount dominion and of nothing else, or a transfer of subordinate dominion and of nothing else, or a conveyance of the legal title to public property in trust, or a conveyance of the legal title to private property in trust, or a conveyance of the beneficial ownership of public property, or a conveyance of the beneficial ownership of private property. Which of these meanings it bears, in a particular case, can only be determined by recourse to other words of the treaty, or to extrinsic facts. But for the words "up the Canadian to its source," there is but one possible meaning. The word "source," applied to a river, is absolutely free from ambiguity. And yet the counsel, having denied the right of the court of claims to interpret the word "cede," in the treaty of 1866, assumes the right himself to interpret the words "up the Canadian to its source,"—in the treaty of 1820,—to interpret them to mean, not "up the Canadian to its source," but "up the Canadian to the 100th meridian of longitude." Certainly the rules of equity are not to be adjusted to suit the convenience of the counsel.

But then, as I have attempted to show on pages 115, 116 and 117 of my brief in cause No. 338, the nature and extent of the Quapaw title do not concern the Choctaws and Chickasaws.

By inserting the words "R des Acansas," on the tracing of the map of the Western Hemisphere, in a place where they do not belong, and by omitting them from the tracing of the map of America (cl'm'ts' exhib. No. 34, opp. Rec. 84), the attorney for the Chickasaws succeeded in completely perverting the testimony of De l'Isle's maps, making them show precisely the contrary of what they did show, and apparently misleading the court below. Page 76.

This, too, is a *mistake*. The words "R des Acansas" *do* belong on the Arkansas. They do not belong on the

Canadian. They are *not* placed on the Canadian on the second map appended to the counsel's brief, which is his copy of the map of the Western Hemisphere. They *are* placed on the Canadian on the counsel's fourth map, the map of America; but they do not belong there. The evidence of De l'Isle's map has not been perverted by us. The three maps under consideration,—the counsel's copies as well as ours,—all show precisely what we claim, that the Arkansas is longer than the Canadian, and that the source of the Canadian is west of the 104th meridian, and also that the province of Louisiana extended westward beyond that meridian.

On pages 56 and 57 of his brief, the counsel says:

> The map at the head of the Quapaw treaty is a part of the treaty. * * It is true that the only boundary lines, which are specifically referred to in the treaty, as being "on the above map," are those which bounded the *eastern portion* of the cession; but there can be *no doubt* that the whole map represents the understanding and intention of the parties to the treaty, and that the map was embodied in the treaty, in order to leave *no doubt* as to the extent of the country ceded thereby.

In the counsel's brief, these words "no doubt" are very abundant and very cheap.

If the court will refer to the so-called "treaty map," which is the twelfth map annexed to the counsel's brief, they will behold, not an ordinary draftsman's delineation, but an artist's picture of a Quapaw warrior, arrayed in plume, quiver, pipe, and fig leaf, *et preterea nihil*, seated on the *quid pro quo*, with the dollar marks inscribed thereon; pointing perhaps to the imaginary, but unnumbered, 100th meridian, while the American eagle, bearing the olive branch, hovers over the Quapaw, the map and the *quid pro quo*. The counsel would either have us believe that this cartographic masterpiece was drawn and painted in advance of the negotiations, or would have us believe that it was drawn and painted pending

the negotiations. If it was prepared in advance, the treaty was a "cut and dried" treaty, and there was no negotiation in the case. That it was drawn and painted during the negotiations is disproved by the inscription, which it bears in the following words:

Map of the Territorial Limits of the Quapaw cession, compiled and laid down by Rene Paul, August, 1818.

This obviously shows that the limits of the cession had been fixed by the treaty, before they were "compiled and laid down by Rene Paul." Did any of the Quapaw negotiators ever see or hear of this map? Where, when, and how did Paul, or anybody else, obtain the consent of the Quapaws to incorporate this *precise map* and *picture* into the treaty?

This error in the statement of the court below is the more remarkable because *the opinion had previously referred to the lease of* 1855, *and had said enough to show that* $800,000 *must have been paid for it*, (Rec. p. 391) although the opinion did not state any definite conclusion as to this. It would seem as if the learned writer of the opinion, when he came to the cession of 1866, forgot all about the lease of 1855, and treated the cession as if the United States had then, for the first time, acquired an interest in the land ceded to it; whereas, in point of fact, it already had the right to permanently settle the Indians from a very large region upon it.—a right which it might, if it saw fit, so use, by filling up the entire district with Indians, as to *exclude the Choctaws and Chickasaws from all enjoyment of the land whatever*. Pages 45, 46.

This statement of counsel is altogether erroneous. The court neither said, nor showed, nor implied that the sum of $800,000 was paid for the lease, either on the page indicated, or on any other page. The counsel's assertion that the United States had, under the treaty of 1855, the *right* to "exclude the Choctaws and Chickasaws from all enjoyment of the land whatever," is disproved by the counsel himself, on page 9 of his brief. On that page he quotes from article 9 of the treaty of 1855, as follows:

Provided, however, the territory so leased shall remain open to settlement by the Choctaws and Chickasaws, as heretofore.

The counsel apparently either thinks that the United States could have kept it open by closing it up, or thinks that the United States could, without dishonor, so use the lease as to annul this proviso.

Now the learned judge has, it is submitted, simply *assumed* that in 1866 the Indians understood the cession to be in trust, without any real proof of it whatever. Page 174.

The counsel is mistaken again. The acts and declarations of the commissioners, at the Fort Smith council, in 1865, *must* have caused the Choctaws and Chickasaws to believe that the cession was a cession in trust for the settlement of friendly Indians on the land. The unbroken chain of executive acts, extending down from 1866 to 1890, warranted, indeed necessitated, a continuance of that belief. So did the Cheyenne and Arapahoe act, which interpreted the cession as a cession in trust. The jurisdictional act has forbidden the use of this interpretation in the case at bar, but the interpretation itself was not repealed, but still stands as the judgment of Congress. The vagary that haunts the minds of the counsel is, that, because the Choctaws and Chickasaws did not demand compensation for the lands, while they were used, as they were in fact used from 1866 to 1890, in strict accordance with the terms of the trust, they could not have believed themselves entitled to compensation after breach of the trust. But what imaginable occasion was there for a demand of compensation, before the lands were diverted from the purposes of the trust?

In the opinion of the court of claims on page 420 of the Record occurs the following statement:

Stripped of all technical considerations, the practical effect of the claim for the absoluteness of the cession is such as to involve the taking,

by the white man, for a consideration to be applied to the benefit of the black man, some millions of acres of land belonging to the red man: the transfer so operating as to enable the whites to keep the land, and the red people to get the consideration only by surrendering its equivalent to the blacks.

On page 202 of his brief, the counsel says: "It is submitted that this is wholly erroneous." He proceeds to establish his assertion that the court erred. He thinks the fact that the sum of $300,000 (facetiously styled the consideration of the cession of 1866) was to go to the freedmen, if they were removed, did not make that seem any the less the consideration for the cession, because article 4 of the treaty imposed on the Choctaws and Chickasaws the burden of giving the freedmen, while they remained, as much land as they should cultivate for the support of their families. In other words, article 4 imposed a burden which could only be removed, either by the gift of the $300,000 to the departing freedmen, or by the gift of citizenship and 40 acres of land to each remaining freedman. Therefore the sum of $300,000 was the consideration for the cession. The counsel's reasoning is unsound. The statement of the court is not erroneous. It is absolutely true.

The suggestion of the learned judge, that "every stipulation that the country should be kept intact as Indian country would thus (*i. e.*, if the cession were absolute) be violated," is, it is submitted, merely begging the question. Page 216.

This is a remarkable assertion. Does the counsel doubt that a conveyance of the absolute beneficial ownership of the land would have swept away all the prior treaty guaranties that the leased district should be kept intact as Indian country? Does he imagine that this consideration does not tend to the conclusion that the cession was not absolute?

After the cession of the remaining interest of the Choctaws and Chickasaws in the land, it continued to be, as it had been before, reserved for Indian settlement. Page 219.

If the cession was a cession in trust for the settlement of friendly Indians on the land, it certainly continued to be reserved for Indian settlement, and, without a breach of the trust, could not have been diverted to any other use. But if the cession was absolute, it was competent for the United States to make any other use of the land. The fact that the United States used the land for Indian settlement, from the date of the treaty of 1866 until 1891, tends to prove that the cession was a cession in trust.

It is therefore clear that the court below has erred in holding that what was done in the case of the Creeks, Seminoles, and Cherokees, has any bearing on the cession of the leased district. Page 228.

On the contrary, the cases of the Creeks and Seminoles are precisely analogous to that of the Choctaws and Chickasaws. The Creeks and Seminoles, respectively, conveyed land in trust for the settlement of friendly Indians to the United States, and received, for such conveyances, in trust, respectively, $975,168 and $325,362. Subsequently they conveyed to the United States absolute titles to the same lands, and received therefor, respectively, $2,280,857 and $1,912,942.02.

It is therefore absolutely preposterous for the claimants to seek to put forced constructions upon the treaty, or to change the plain language of its terms, on the ground that, as "an unlettered people," they cannot be supposed to have understood all that it meant. Pages 183, 184.

The Choctaws and Chickasaws, as the counsel well knows, have asked for a liberal construction of the treaty, *not* on the ground of their *illiteracy*, but on the ground of their *dependence*, *weakness*, and *helplessness*,—on the ground

set forth, by this court, in the case of the Choctaw Nation *v.* United States, 19. U. S. 1, 28.

The counsel for the United States has dug up four alleged admissions by the Choctaws and Chickasaws of the absolute character of the cession of 1866. They are curiosities, and are exhibited on pages 174 to 177 of his brief. The first is the Choctaw act of November 27, 1867. These are the words of the act:

Sec. 3. That the national attorney be and he is hereby instructed to respectfully bring to the notice of the Commissioner of Indian Affairs of Washington city, that this nation will not consent to give the freedmen residing among them the forty-acre lots of land, including the right of suffrage, mentioned in the third article of the treaty of April 28, 1866, when they have submit|ted| humbly to the forced sale of the "leased district," lying west of the 98th degree west longitude, *for about two and a half cents per acre, for objects of negro colonization upon their borders.*

The counsel considers this an admission that the cession was a conveyance of the absolute beneficial ownership of the land.

The second alleged admission is stated by the counsel on page 176 of his brief as follows:

The next statement is found in the Chickasaw protest of 1872, which contains these words: "It is believed that the only rights given up by the treaty of 1866 are the right to hold slaves, the right to the leased district, so called, between the 98th and 100th meridians of west longitude, *upon certain conditions therein set forth*, and the unrestricted right of self-government."

On pages 17, 18, 19, 20 of this brief I have explained the nature of these conditions.

The third of these admissions is alleged, on page 177 of the counsel's brief, to have been made in a memorial of the Chickasaw delegates addressed to the president of the United States. The object of that memorial was to secure the removal of the freedmen, in pursuance of the stipulation of article 3 of the treaty of 1866. It had no relation to the title to the leased district. The entire ar-

ticle was copied literally into the memorial, which contained nothing in the remotest degree resembling an interpretation of the cession, or an admission that it was an absolute conveyance.

The fourth alleged admission of the absolute character of the cession is set forth on page 177 of the brief in the following words:

Precisely the same words are used on page 17 of the same document, in a statement, dated April 22, 1884, made by Halbert E. Paine, then and now the attorney for the Chickasaws.

In 1884 I was employed by the Chickasaws to attend to their business before the interior department and congress. My employment had no connection with the title to the leased district. The question whether the cession of 1866 was absolute, or in trust, had never occurred or been suggested to me. I learned that a bill had been presented, in congress, conferring Chickasaw citizenship on the freedmen. There were no Chickasaws in Washington at that time. It seemed to me that congress ought not to pass the bill without hearing the Chickasaws, and, in order to secure delay, I submitted a statement to congress, in which I set forth the *substance of the language* of article 3 of the treaty, with no reference to any question except that of the right of the freedmen to Chickasaw citizenship. I not only had no authority from the Chickasaws to interpret the treaty, but had no purpose to interpret it,—indeed had never communicated, directly or indirecty, with the Chickasaws on the subject.

This proviso does not relate to what the United States is to do with the land acquired by this cession, but *exclusively* to the disposition and uses of the purchase money, *as the court below admits.* Page 28.

This is erroneous. What the court said was this:

Following the cession is a proviso relating to the disposition and uses of the fund.

The word "exclusively" is interpolated by counsel. The disposition and uses of the fund provided for were such as necessarily related to the title of the land. For the fund was to be used to remove the Choctaw and Chickasaw freedmen, whom the United States agreed to remove within a prescribed period of time, and there was no district available for their colonization except the leased district. This proviso implied that the title was encumbered with a trust for the settlement of freedmen on the land.

Moreover there was absolutely nothing on which to base the idea that the "leased district" was sold for "objects of negro colonization." Page 175.

On the contrary, article 3 itself obviously implies that one of the uses of the land was to be the settlement of freedmen removed from the Choctaw and Chickasaw nations.

It is true that a deed, "absolute" on its face, may be shown to be a mortgage or to be subject to conditions; but it is not true that a treaty can be dealt with in any such way. A treaty is "the law of the land," and must control the court; the court can have no control over the provisions of a treaty. Page 40.

But it is for the court to determine whether a treaty is or is not "absolute on its face." Evidently the judges and publicists, who enunciated the rules set forth on pages 6, 7 of this brief and on pages 1 to 13 of my brief in cause No. 338, differ with the learned counsel on this subject. The court did not attempt to *avoid* the treaty on the ground of duress or fraud. On the contrary, the right to do so was expressly disclaimed by the court. Rec. p. 409. The court interpreted the treaty; but did not annul it.

The counsel asserts, on page 178, that the 4th and 5th articles of the unsigned treaty of 1865 prove that the fifth proposition of the commissioners' ultimatum was embodied in the 30th, 31st, and 37th articles of the treaty of 1866. He is mistaken. The language of the ultimatum was "lands *must* be set apart." The taking effect of articles 30, 31, and 37 was left to the option of the Choctaw and Chickasaw legislatures, whose decision was adverse, and the acts never took effect. Moreover, the ultimatum required lands to be "set apart for the friendly tribes in Kansas and *elsewhere*." The word *elsewhere* was applicable to the locations of all friendly tribes, whether north, south, or west of the Indian territory. But articles 30, 31, and 37 made no provision except for Indians north of the Indian territory. And, finally, those articles did not make provision for the settlement of *tribes* at all, but only for making Choctaw and Chickasaw citizens of *individual* Indians who had resided north of the Indian territory.

On page 209 of his brief the counsel asserts that under articles 30 and 31 of the treaty of 1866 the right of the Kansas Indians to settle down at once in the Choctaw and Chickasaw territory east of the 98th meridian "was absolute whether the councils agreed to the proposed plan or not,"—that the taking effect of those articles was not dependent on the action of the councils.

What was the meaning of the words "may at once come into the said Choctaw and Chickasaw nations" in article 31? The counsel in his quotation omits material parts of article 30. These are its words:

Article 30. The Choctaw and Chickasaw nations will receive into their respective districts, east of the ninety-eighth degree of west longitude, in the proportion of one-fourth in the Chickasaw and three-fourths in the Choctaw Nation, civilized Indians from the tribes known by the general name of the Kansas Indians, being Indians to the north of the Indian Territory, not exceeding ten thousand in number, who shall have in the Choctaw and Chickasaw nations, respectively, the same rights as

the Choctaws and Chickasaws, of whom they shall be the fellow-citizens, governed by the same laws and enjoying the same privileges, with the exception of the right to participate in the Choctaw and Chickasaw annuities and other moneys, and in the public domain, should the same, or the proceeds thereof, be divided *per capita* among said Choctaws and Chickasaws, and among others the right to select land as herein provided for Choctaws and Chickasaws, after the expiration of the ninety days during which the selections of land are to be made, as aforesaid, by said Choctaws and Chickasaws.

The only property right, which articles 30 and 31 purported to secure to any Kansas Indians, was the single right to a quarter section of land, *provided* the Choctaw and Chickasaw legislatures should, as suggested in article 11, decide upon a survey and allotment of the Choctaw and Chickasaw lands, such quarter section not to be selected until after the Choctaws and Chickasaws had made their selections. It was not contemplated that the Kansas Indians should become *landless* citizens of the Choctaw and Chickasaw nations. But if their legislature should reject the proposition to survey and allot their lands, those Indians could have no land, and their admission would not be within the object or scope of the treaty. If, on the other hand, those legislatures should agree to the survey and allotment of their lands, the right of the Indians would be secured, and the only question as to their acquisition of the land would be a question of time.

The meaning of the treaty then was that when their rights became once fixed by such legislation, the Kansas Indians might "at once come into the Choctaw and Chickasaw nations," without waiting two, three, or four years for the completion of the surveys, maps and selections provided for. This article was evidently so understood by the United States. The Choctaws and Chickasaws did not decide to survey and divide their lands, and *therefore* not a single Kansas Indian was ever located east of the 98th meridian. The counsel thinks the government had the right to locate them there, but *has waived it for* 34 *years.*

The counsel, on pages 202–213, assails the court's conclusion that "the fifth stipulation is either implied from the language of the third article, or omitted altogether from the treaty." He thinks this stipulation is embodied in articles 30, 31 and 37. He is mistaken. Not one of these three articles ever became operative.

But if these three articles had gone into operation, they would not have embraced the fifth branch of the Fort Smith ultimatum. The requirement is that the land must be set apart for the friendly tribes in Kansas, or *elsewhere.*" The word "elsewhere" is applicable, as I have said, to the localities of all friendly tribes outside of Kansas. But articles 30, 31, 37 only purport to provide for the case of Indians north of the Indian territory.

Indians residing elsewhere are provided for, not in article 4, but only in article 5 of the unsigned treaty. Article 5 of the unsigned treaty applies to all friendly Indians, whether in Kansas or elsewhere.

On pages 206, 207, the counsel assails the court's opinion that "the fifth stipulation meant *tribal* occupancy, and a future agreement with reference to this kind of an occupancy, and there is no such agreement to be found in article 30."

The counsel is mistaken. The fifth stipulation meant exactly what the court said it meant. But the provision of articles 30 and 31 is for making Choctaw and Chickasaw citizens of individual Indians.

The counsel asserts (pages 16 and 17) that in 1866 the sum of $150,000 was paid to the Choctaws and the sum of $50,000 to the Chickasaws, as part of the consideration for the cession of the leased district. This is erroneous.

Not a penny was paid for that purpose. These sums were lent to the Choctaws and Chickasaws, to be repaid from their funds in the treasury of the United States. In fact, the counsel himself, on page 16, contradicts this statement. He says that article 41 of the treaty of 1866 provided that these sums should be *advanced*, "to be repaid out of the said moneys when due, or out of other moneys in the hands of the United States."

The counsel asserts (page 25) that "the court has undertaken to reform the treaty of 1866." This is a mistake. The court has not undertaken to reform the treaty. It has undertaken to interpret the treaty. This error of the counsel is also based on the assumption that the word "cede" *per se* imports an absolute conveyance.

The court of claims, *referring to the leased district only*, said: (Rec. 403, 419.)

> There is nothing in the record to indicate that the Choctaws and Chickasaws had any information as to the purpose of the government, *except as embraced in the fifth proposition, and fifth article* of the unsigned treaty submitted at Fort Smith.

The counsel perverts this into an assertion relating to the Choctaw and Chickasaw *country east of the leased district*. He says: "The court evidently forgot all about the 4th article of the unsigned treaty." And yet he well knows that the 4th article contains no reference whatever to the leased district,—that it refers only to land east of the 98th meridian. He concludes as follows on page 213:

> The learned judge's idea of the connection between the fifth stipulation and the cession of the "leased district," therefore, being manifestly due to his overlooking the fourth article of the unsigned treaty, must be regarded as wholly erroneous, and the conclusion must be that the court below has erred in supposing that the fifth stipulation was not substantially embodied in articles 30, 31 and 32.

With characteristic brevity he has corraled a large herd of errors in this paragraph.

On page 241 of his brief the counsel says:

> This is a serious departure from the usual position of a court of equity, in which the interests of the *cestuis que trustent* are held to be of primary importance, the possible reversionary interests of the creator of the trust being wholly subordinated to them.

The counsel evidently thinks that the trust was such as would be created if A should convey to B the legal title to lands, for the permanent settlement of C thereon. In that case C would at once become a beneficiary of the trust. The grantor of the deed would constitute *him a cestui que trust.* But the trust created by this treaty was very different. No particular person was by the treaty constituted a *cestui que trust.* But A, instead of constituting particular persons *cestuis que trustent*, empowered B, not only to select *cestuis que trustent*, but also to determine their number. The counsel not only ignores this peculiarity of the trust, but also thinks that the trust would authorize the United States to settle 1,060 Indians on 743,610 acres of the land, in such a way that each man, woman and child would receive 701½ acres,—160 acres as an allottee of the legal title, and the cash proceeds of 541½ acres. He thinks that the court of claims, in taking a different view of the cession, slighted the *cestuis que trustent.* I respectfully submit that the court went to the utmost verge of its equity powers, when it gave 160 acres of land, in fee, to each of these men, women and children, under a treaty which contemplated the investment of the Indian settler, not with the fee of the land, but only with its use.

The last 40 pages of the brief are devoted to an attempt to show that, although the so-called Wichita reservation was never, by any treaty, or statute, assigned to the 1,060 persons constituting the Wichita and affiliated bands, yet the fact of their location on that tract of land,

by the sufferance of the United States authorities, entitles each man, woman and child, under the treaty of 1866, to 701½ acres of land,—to 160 acres in fee and to the proceeds of the sales of 541½ acres. The successful demonstration of such a proposition would seem to require considerably more than forty pages of argument.

If the counsel means, in his statement at the head of page 188, that the clause, which interpreted the cession, was singled out for opposition, in Congress, he is mistaken. It was the appropriation, as a whole, to which objection was made.

Referring to a memorial of the Choctaws and Chickasaws, addressed to the 51st Congress, the counsel, on page 189, says:

> It also misrecited the fifth stipulation presented at the Fort Smith council.

This is a mistake. The alleged erroneous version not only appeared in the report of the Commissioner of Indian Affairs, who was the president of the Fort Smith council, but actually appears in the original papers on file in the Indian office. Rec. pp. 74, 141; Appendix to Rec. p. 156.

On page 217 of his brief the counsel contends that the word "territory," in article 43 of the treaty of 1866, does not include the leased district, because neither the word "limits," in article 42, nor the word "country," in article 39, includes that district. This is an exaggerated *non sequitur*. The language of article 43 is this: "The United States promise and agree that no white person, except * * * or persons traveling through, or

temporarily sojourning in, the said *nations*, or either of them, shall be permitted to go into said *territory*." If the word "territory" had not included the leased district, the language would have been, "the United States promise and agree that no white person, except * * * or persons traveling through, or temporarily sojourning in, said *nations*, or either of them, shall be permitted to go into said *nations*." Moreover, the word "territory" includes the leased district once in article 3, and fourteen times in article 8 of this very treaty.

The counsel says, on page 233: "It is submitted that the confusion is in the mind of the learned judge." I venture to suggest that the confusion is in the mind of the learned counsel. He thinks that when an Indian nation conveys to the United States a tract of land, annexing to the grant the condition that it shall be used for the settlement of other Indians to be selected by the United States, the only parties interested are the United States and the selected Indians. He thinks that, because such Indians, as are selected and settled, by the United States, become beneficiaries of the trust, the grantors of the land, who create the trust, lose all interest therein. He is oblivious of the creator of the trust, who, upon a breach thereof, becomes the reversioner of so much of the estate as is diverted from the purposes of the trust.

The counsel says, on page 45, that the court of claims stated, on page 406 of the record, that the Choctaws and Chickasaws parted with all interest in the leased district for $300,000. The counsel is mistaken. The court made no such statement. The counsel is equally mistaken, in his assertion (page 45) that the United States paid the Choctaws and Chickasaws $1,100,000 for the leased dis-

trict. The facts are these: In 1855 the United States paid the Choctaws and Chickasaws $800,000 for a lease of the leased district containing 7,713,239 acres, AND a quit-claim of a tract of 8,225,220 acres west of the leased district, which latter tract was worth, in 1866, at the government price of $1.25 or $2.50, either $10,381,525, or $20,763,050. Not a penny of the $300,000 entered into the consideration for the purchase of the land. Not more than $400,000 has from first to last ever been paid for the 7,713,239 acres of land in the leased district, which was worth in 1866, at the government price, from $9,641,548 to $19,283,096.

The counsel assails the court of claims (page 30) for looking at outside facts, in its interpretation of the ceding clause of the treaty of 1866, before considering the context of the treaty. But surely the court ought to have some discretion in the arrangement of topics in its opinions. It ought not to be put in a straight jacket.

A sharp criticism of the court of claims, covering three pages (30, 31, 32) of the counsel's brief, concludes with these words:

None of these provisions can possibly affect the character of the cession.

This is erroneous. The third article of the treaty itself shows that the sum of $300,000 was not a consideration for the cession of the land, and thereby tends to show that the cession, being without consideration, was not a conveyance of the absolute beneficial ownership of the land. Moreover, the stipulation of the United States to remove the freedmen tends, as I have said, to show that the leased district was to be used for the colonization of such freedmen; for there was no other district available for their colonization.

A criticism of the court of claims covering five pages of the counsel's brief (33 to 37) culminates as follows:

Why should not the literal wording of the treaty express the intention of the parties? The opinion gives no answer to this question; and, until it is satisfactorily answered, the reasonable understanding of the matter must be that the language of the treaty, plainly importing an absolute cession, expresses precisely what the parties intended.

This is all based on the unwaranted assumption that the word "cede," standing unqualified in a treaty, *per se* and necessarily imparts the conveyance of the absolute beneficial ownership of the land.

The court below *strives to justify its assumption* that the Choctaws and Chickasaws believed, in 1866, that the cession was in trust for Indian settlement. Page 179.

In order to *justify* the application of language like this to a judicial tribunal, it would seem that either the court ought to be very "low down" or the counsel very "high up."

There is absolutely nothing in the treaty, from one end to the other, nor in any of the circumstances under which it was made, nor in any contemporaneous statements, or transactions, to give these words any other meaning. Page 184.

That sounds the crack of doom for the Choctaws and Chickasaws. It is "*Mene! Mene! Tekel Upharsin.*"

On page 193 the counsel, referring to a report of the Indian office, says:

He failed to call attention to any of the misstatements of the memorial. On the whole this communication, as well as the committee's report, might fairly be regarded as a brief in support of the claim.

On page 195, referring to reports of committees of the Senate and House, he says:

The memorials contained all the erroneous statements of the prior memorials, as did also the reports.

And on page 196 he says :

The House report (House Rep. No. 1661, fifty-second Congress, first session,) cannot even claim the merit of colorable originality.

The counsel for the United States seems to be out of humor, not only with the court of claims and the counsel for the Chickasaws, but also with the "rest of mankind."

In fact, taking the opinion of the court below, as it stands, the *suspicion* arises that this evidence *aliunde* has been looked at first, and has so affected the mind of the learned judge as to make him afterwards see, in the treaty, the doubtful and ambiguous provisions, which he says authorize a recourse to evidence *aliunde*. Page 30.

It is to be hoped that the court of claims may survive the shock of the counsel's *suspicion*. And yet the condition of a "suspect" is not a pleasant predicament for a court. However, it is gratifying, as well as surprising, to observe that the genesis of this suspicion has not exhausted the learned counsel, nor its recoil disabled him.

But it is not practicable, within the limits of this brief, to consider all the charges which the counsel brings against the court of claims. With the impetuosity and vigor of youth and the assurance which self-conscious power lends, he hurls his missiles right and left at that "erring" and "assuming" and "overlooking" and "forgetting" and "mistaking" and "misunderstanding" and "misstating" tribunal. But his missiles are not the deadly darts of Ulysses, nor yet Mauser nor Krag-Jorgensen projectiles. They have not exterminated the court; nor have they perceptibly rent or flecked the judicial ermine.

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